Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

WENDELL F. GILLEY, an individual
and as class representative,
Petitioner(s),

v.

MONSANTO COMPANY, INC.,
a corporation, *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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June 2, 2009

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QUESTION PRESENTED

Whether after *Metropolitan Life Insurance Co. v. Glenn*, 554 U.S. __, 128 S.Ct. 2343 (2008) a non-reversionary trust vitiates the need for consideration of an ERISA plan's conflict of interest as a factor?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the Court whose judgment is the subject of this petition is as follows:

Defendants-Appellees and Respondents: Monsanto Company, Inc., Monsanto Company Salaried Employees' Pension Plan, Monsanto Company Employee Benefits Plan Committee, Monsanto Company Employee Benefits Executive Committee, and Pharmacia Corp.

Plaintiff-Appellant and Petitioner: Wendell F. Gilley, as an individual and class representative.

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PETITION FOR A WRIT OF CERTIORARI

Wendell F. Gilley ("Gilley") respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit dated February 3, 2009, is unpublished and is reproduced at App. A 1a-2a.

A prior published opinion of the United States Court of Appeals for the Eleventh Circuit dated June 28, 2007, is officially published in the Federal Reporter at 490 F.3d 848 (11th Cir. 2007) and is reproduced at App. E 26a-47a.

The District Court's Orders, Findings of Fact and Conclusions of Law are unreported and reproduced at App. C, D and F to L.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 3, 2009. (App. A 1a). A petition for panel rehearing and *en banc* review was timely filed and subsequently denied on April 6, 2009. (App. B 4a). Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of

rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 29 U.S.C. §§ 1001 *et seq.*

The Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132, provides in pertinent part·

> (a) A civil action may be brought—
>
> > (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;
> >
> > (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the plan;

29 U.S.C. §§ 1132(a)(2) & (3).

STATEMENT OF THE CASE

I. INTRODUCTION

ERISA was enacted in 1974 to regulate employer-sponsored employee benefits to ensure that employees receive promised benefits in accordance with the terms of their plans. 29 U.S.C. §§ 1001 *et seq.* ERISA § 1001(b) declares that the purpose of the Act is "to establish standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). While ERISA does not mandate that employers establish employee pension plans, if an employer does establish a pension plan that it alleges qualifies under ERISA and Internal Revenue Service "IRS" regulations, the employer receives significant benefits including, but not limited to, enhanced worker retention, beneficial tax treatment of assets held in trust, and super-preemption of state laws that would permit the recovery of damages for intentional or even negligent misconduct in the administration of the plan. In exchange, employers are to adhere to ERISA's mandates. *See* 29 U.S.C. § 1104(D). Pension plans must be maintained and administered solely and exclusively for the benefit of a wide range of employees, highly compensated employees "HCEs" and working class employees "nonHCEs". 29 U.S.C. § 1104(a)(1). Top-hat plans, unfunded plans for officers, shareholders, and executives of the company, are not to be considered

qualified plans under ERISA. *See* 26 U.S.C. § 401(a)(4), 26 C.F.R. §§ 1.401(a)(4)-1.

II. FACTUAL BACKGROUND

In 1941 Monsanto Company, Incorporated "Old Monsanto" established a defined benefit retirement pension plan for its employees.[1] Beginning in 1951 Old Monsanto amended the plan every five years *as to certain groups of employees*[2] identifying each amendment as a separate plan: the 1956 plan, 1961 plan, 1966 plan, 1971 plan, 1976 plan, 1981 plan, the 1986 plan etc. [R 64 at App 1 Exh B p. 42]. Petitioner worked for the chemical division of Old Monsanto from August 30, 1972 until he was laid off on March 31, 1981. (App. H 56a fn 1). Petitioner, like other production level employees, was a participant in the Monsanto Salaried Employe(e)s' Pension Plan as a salaried nonexempt employee subject to overtime provisions under the Fair Labor Standards Act of 1938 "FLSA".[3] 29 U.S.C. §§ 201 et seq. [R 70 ¶ 2]. Old Monsanto closed the North Alabama plant where Gilley worked in February 1981 approximately nine and a half years after production at the plant began.

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[1]A plan refers to a written instrument, a benefit plan, and here an "account" in a collective trust. IRS Publication 575 at http://www.irs.gov.

[2]Old Monsanto amended the plan every five years prior to ERISA to either cover or exclude "working class" hourly employees.

[3]The plant where Gilley worked operated on a Rotating Shift Schedule that incorporated substantial amounts of both mandatory and voluntary overtime into the standard work year. [R 35].

The 1976 plan, which was the plan in effect when the plant closed, was the first ERISA plan offered by Old Monsanto to its employees. (App. E at 28a, 29a fn 3). Under the 1976 plan a participant was credited with service for both pre-ERISA years of service as well as years of service under the 1976 plan according to ERISA's 1000 Hour Rule, including a year in the event of a layoff.[4] 29 U.S.C §§ 1053(a)(2)(A) & (C); *see also* 29 C.F.R. § 2530.200b-2. Records maintained by Old Monsanto reflected that Gilley had been credited with ten years of service with an employment date of 8/31/1972 and a termination date of 9/27/1982 adjusted to reflect a full year of service for 1972. [Hearing of August 2005 Exhibit "HExh" 17]. Old Monsanto's management promised Gilley a pension when the plant closed.[5] [R 35].

After Gilley and others situated similarly to him were laid off, Old Monsanto amended the 1976 plan and continued it as the 1981 plan without prior notice to participants pursuant to 29 U.S.C. § 1054(h). [R 182-14, 168-23]. Old Monsanto made the effective date of the amendment January 1, 1981, but the record reflects it was not adopted until sometime after the plant was closed, probably in 1982, pursuant to 29 U.S.C. § 1082(c)(8). *Id.*

Critical to these proceedings is the reorganization of Old Monsanto between 1997 and

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[4]The 1981 amendment excluded credit for overtime.

[5]New Monsanto's plan administrator testified that eligibility is determined when former employees apply for benefits. [R 101 at 343:16-18].

2003 into its three separate business lines: the chemical business, the agricultural business, and the pharmaceutical business. [R35]. In 1997, Old Monsanto spun off its chemical business to its shareholders, officers and executives in the form of a stock dividend, while renaming the spinoff as Solutia, Inc. "Solutia". *Id.* at ¶ 4. Between 1999 and 2002, Old Monsanto, through spinoffs and mergers, became "Pharmacia Corporation" which encompassed the pharmaceutical business. New "Monsanto Company" retained the agricultural and life science business. After the split, Solutia, Pharmacia, and New Monsanto Company each established "cash balance" pension plans from assets formerly held in trust by Old Monsanto.[6] As a result of the spinoff, in 1997, Solutia acquired 70% of all the unfunded pension liability of the Old Monsanto chemical business including liability for Gilley's pension. [R 168-26, 170-5].

In 2001 Gilley called a Solutia benefit center at a plant in Decatur, Alabama to inquire about his pension benefit. [R 101 at 146]. Petitioner was initially told he would receive his pension, but he was later told he needed to contact Pharmacia. [R 101 at 146]. When he did so, Pharmacia advised Gilley that he was not entitled to a pension *"at this time"*. [HEx. 29]. In early 2003 Gilley was notified by New Monsanto that he was ineligible for a pension altogether under the 1981 amendment that was adopted after his layoff. [HExh. 30].

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[6]Under a cash balance plan the company establishes a hypothetical balance in a virtual account for each participant. *Drutis v. Rand McNally & Co.*, 499 F.3d 608 (3rd Cir. 2007).

Petitioner filed an administrative appeal with New Monsanto the spinoff entity that denied his pension under the 1981 amendment. [HExh. 32]. On December 17, 2003, Solutia filed for bankruptcy protection in the United States Bankruptcy Court Southern District of New York seeking relief from liability for promised benefits assumed from Old Monsanto as well as other assumed liabilities.[7] *In re: Solutia Inc. et al.* Case No. 03-17949 (PCB).

On March 17, 2004, Petitioner filed a class action suit in the United States District Court for the Northern District of Alabama. *Gilley v. Monsanto Company, Inc.* Case No. 04-0562. [R 1]. In support of a 12(b)(6) motion to dismiss Respondents filed a document that was mislabeled as the 1976 plan[8]. [R 14; 19]. When Respondents admitted filing a mislabeled document that was not the 1976 plan, the complaint was amended to specifically bring individual and representative claims under 29 U.S.C. §§ 1132(a)(2) & (a)(3) for breach of fiduciary duty and violation of 29 U.S.C. § 1054(g)(1), 29 U.S.C. § 1140, and 29 U.S.C. § 1132(c) for: filing a misidentified plan document; closing the plant and amending the plan in a discriminatory manner; amending the plan to divest "working class" employees who were on

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[7]Solutia assumed liability for unfunded pension benefits but not the company name adding to the confusion over liability for promised pension benefits.

[8]New Monsanto's plan administrator produced the same misidentified document during the administrative appeal concealing the existence of the actual 1976 plan that credited service for overtime hours. [HExh. 24; R 68].

layoff status of their accrued vested benefit; failing to notify participants of changes to the plan; promising employees a pension only to intentionally deny benefits twenty plus years later, and; failing to act in the interests of plan participants over the interests of shareholders, officers and other HCEs.

Respondents opposed class certification and recast the entire litigation as a single claim for benefits reviewed under a deferential review standard; and, over Petitioner's objection, demanded a limited hearing based on a stipulation that Gilley was vested if he had 1000 hours of credited service in 1972. [R78-81, 120, 132; App. J 64a-75a]. Finding the benefit decision was unreasonable and the result of a clear conflict of interest, the District Court permitted Petitioner to introduce social security records and substitute a non-discriminatory equivalency based on work time that credited hours of service for overtime.[9] (App J; *see also* App. F at 49a and App. H 56a-60a citing 29 C.F.R. §§ 2530.200b-3(a), (b) & (c).

III. Decision of the Eleventh Circuit

Despite their stipulation, Respondents appealed the award of Petitioner's accrued benefit, claiming the District Court's award of benefits constituted legal and not equitable relief allowable under 29 U.S.C. § 1132(a)(3) based on this Court's holding in

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[9]Abstention, remanding to an administrator, is not an option when the decision is the result of an actual conflict of interest, the reviewing court must assume equitable jurisdiction.

Great-West Life & Annuity Insurance Company v. Knudson, 534 U.S. 204 (2001). [R 135]. While the first appeal was in briefing, this Court issued its ruling in *Sereboff* clarifying that an equitable claim for benefits was not a claim for monetary relief *per se*. *Sereboff v. Mid Atlantic Medical Serv., Inc.*, 547 U. S. 356 (2006).

Finding a lack of finality pursuant to Rule 54(b), the Eleventh Circuit Court of Appeals nonetheless found appellate jurisdiction under 28 U.S.C. § 1292(a)(1) based on the injunctive nature of the order.[10] (App. E 35a-36a). Relying on *Buckley v. Metropolitan Life*, 115 F.3d 936, 939-40 (11th Cir.1997) ("*Buckley*"), a welfare benefit case, the Court held as a matter of law that there is never a conflict of interest when "benefits are paid from a trust that is funded through periodic contributions so that the provider incurs no immediate expense". (App. E 38a). The Court, after finding no conflict of interest as a matter of a law, declared the District Court's findings clearly erroneous and vacated the judgment. (App. E 38a-39a). The Eleventh Circuit found the *ex post facto* 1981 amendment adopting a discriminatory equivalency that caused forfeiture when applied retroactively did not implicate ERISA's "anticutback" rule and later amendments could be applied to an employee who had not completed ten years of service without violating 29

[10]Recognizing jurisdiction based on the equitable nature of the lower court's order the Eleventh Circuit applied a legal standard of review holding there is never a conflict of interest when benefits are paid out of trust despite the lower court's finding of a clear abuse of discretion *ab initio*. (App. E).

U.S.C. § 1053.[11] (App. E at 43a-46a). The Eleventh Circuit remanded to the District Court in the second instance for consideration of Petitioner's other claims for equitable relief. (App. E 46a-47a).

Petitioner filed a petition for certiorari. Respondents responded the appeal was interlocutory, Petitioner's claims for breach of fiduciary duty were never reached, there was no split in the circuits regarding the proper standard of review for claims brought under 29 U.S.C § 1132(a)(3), and the decision was not contrary to this Court's opinion in *Central Laborer's Pension Fund v. Heinz*, 541 U.S. 739 (2004)("*Heinz*") or *Varity Corp. v. Howe*, 516 U.S. 489 (1996)("*Varity*")(employer scheme to deny welfare benefits). This Court denied the petition on January 14, 2008. *Gilley v. Monsanto Co., Inc.*, 490 F.3d 848, (11th Cir 2007), *cert denied*, 128 S. Ct. 1086 (U.S. January 14, 2008)(No. 07-643).

On remand, the District Court found Petitioner lacked standing based on the law of the case doctrine and the Eleventh Circuit's finding Petitioner was not vested in the retirement plan when he was terminated; and therefore, he was not a "participant" in the Monsanto Company Salaried

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[11]New Monsanto's plan administrator claimed there were no time records for this time frame, but during the pendency of the first appeal personnel at the Solutia plant in Decatur, Alabama shredded records from the Sand Mountain plant stored there since the plant closed in 1981. [R 170].

Employees' Pension Plan.[12] (App. D 20a and 24a & App. C at 9a and 10a at fn 5); *but see LaRue v. DeWolff, Boberg & Assoc., Inc.* 552 U.S._____, 128 S.Ct. 1020, 1026 fn 6 (February 2008)("*LaRue*")(Rejecting motion to dismiss after the petition for certiorari was granted recognizing a former participants' right to bring claims for breach of fiduciary duty under 29 U.S.C. § 1132(a)(2) if there is a colorable claim).

The Eleventh Circuit affirmed the District Court despite a change in the law in the circuit effected by this Court's decision in *Metropolitan Life Insurance Company v. Glenn,* _____554 U.S. _____, 128 S.Ct. 2343 (2008) cautioning reviewing courts not to disregard structural conflicts of interest, Petitioner's submission of additional undisputed evidence of Respondents' abuse of discretion and scheme to convert assets of the trust into nonqualified benefits for top-hats, and proof of the manifestly unjust result.[13] (App. A 2a). *Metropolitan Life Insur. Co. v. Glenn,* 554 U.S. ___,

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[12]A "right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent" is a vested right. BLACK'S LAW DICTIONARY 1349 (8th ed. 2004). Respondents never disputed Petitioner was a participant or that he was vested under the 1976 plan if he had 1000 hours of service for 1972. (App. J); [R 70 ¶ 2].

[13]POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 218 at 368 (1994) ("The exclusive equitable jurisdiction, or the power of courts to adjudicate upon the subject-matters coming within that jurisdiction, exists independently of the adequacy or inadequacy of the legal remedies obtainable under the circumstances of any particular case.").

128 S.Ct. 2343 (June 19, 2008)("*MetLife*"); *Lanfear v. Home Depot, Inc.*, 536 F.3d. 1217 (11th Cir. 2008) overruling *Nugent v. Jesuit High School of New Orleans*, 625 F.2d 1285 (5th Cir. 1980); *LaRue*, 128 S. Ct. 1026 fn 6. A petition for rehearing and *en banc* review was denied April 6, 2009. A timely filed motion to stay the mandate and a motion to recall the mandate were denied on April 28, 2009.

REASONS FOR GRANTING THE PETITION

The questions presented in this petition for writ of certiorari raise important issues concerning ERISA's promised protection against forfeiture of vested pension benefits and conflicts of interest when employers administer pension plans. The current state of ERISA jurisprudence in the Eleventh Circuit has reduced Congress' promise of protection of promised benefits to a nullity. Instead of protecting promised benefits, ERISA is being used here as a means of causing a forfeiture of vested benefits belonging to "working class" participants at the company's discretion. (App. A-L).

In *Bruch*, this Court recognized that parties were free to incorporate narrower standards of review into their agreements, but refused to incorporate an arbitrary or capricious standard wholesale into ERISA. *Firestone Tire & Rubber v. Bruch*, 489 U.S. 101, 109, 115 (1989) ("*Bruch*"). Although never addressing the standard of review for claims brought under 29 U.S.C. § 1132(a)(2) & 29 U.S.C § 1132(a)(3), this Court has made it clear

that plan sponsors are not entitled to absolute discretion. Still, there remains confusion over the availability of a participant's right to equitable relief among the circuits. This Court should grant the petition to clarify that participants who have been denied their beneficial interest in property held in trust are entitled to bring claims against the employer-administrator for "appropriate equitable relief" for breach of fiduciary duty and violation of ERISA when "but for" the trustees' self-interested abuse of discretion participants would be entitled to their accrued benefit.

I. Review Is Warranted To Resolve A Split In The Circuits As To Whether The Existence Of A Non-Reversionary Trust Vitiates The Need For Consideration Of An ERISA Plan's Conflict Of Interest As A Factor.

Prior to *MetLife* the Eleventh, Third, and Fourth Circuits had held the structural conflict of interest was not a factor to be considered when benefits were paid out of a non-reversionary trust. *Buckley*, 115 F.3d at 939-40 (holding where the company neither incurs a direct expense in paying benefits nor directly profits from denying or discontinuing benefits, there is no conflict of interest); *Post v. Hartford Insur. Co.*, 501 F.3d 154, 164 n.6 (3d Cir. 2007)("when the employer both funds and administers the plan, but pays benefits out of a fully funded and segregated ERISA trust fund rather than its operating budget, no structural conflict of interest is created"); *Vitale v. Latrobe Area Hosp.*, 420 F.3d 278, 282-83 (3rd Cir.

2005)(heightened version of abuse of discretion standard was not applicable because plan benefits were paid out of a separate trust fund); *de Nobel v. Vitro Corp.* 885 F.2d 1180, 1191-92 (4th Cir. 1989)(no conflict of interest from an employer-funded plan where plan funds were held in a trust because there is no direct and immediate expense to the employer from the payout of benefits).

The Ninth, First, and Eighth Circuits, in light of this Court's decision in *MetLife,* have now declared this line of cases no longer applicable because the structural conflict of interest must be considered as a factor that cannot be ignored. *See Burke v. Pitney Bowes Inc. Long-Term Disability*, 544 F.3d 1016, 1026 (9th Cir. 2008)(remanding for consideration of conflict of interest); *Chronister v. Unum Life Ins. Co. of America*, No. 07-3552, 2009 U.S. App. LEXIS 9033 (8th Cir. April 30, 2009)(judgment for insured based on abuse of discretion); *Denmark v. Liberty Life Assur. Co.*, 2009 U.S. App. LEXIS 9825 (1st Cir. May 6, 2009)(remanding for consideration of conflict of interest).

The Eleventh Circuit remains steadfast in its position that when benefits are paid out of a non-reversionary trust there is never a conflict of interest. *See e.g., Gilley v. Monsanto Co., Inc.*, 490 F.3d 848, 856 (11th Cir. 2007)(reversing an award of equitable relief based on the lower court's finding of an actual conflict of interest because benefits were paid from a non-reversionary trust and affirming dismissal on remand); *White v. Coca-Cola*, 542 F.3d 848 (11th 2008)(relying on *Gilley*);

Townsend v. Delta Family-Care Disability and Survivorship Plan, No. 08-11340, 2008 U.S. App. LEXIS 21547 (11th Cir. Oct. 8, 2008).

If, as the Eleventh has held, the arbitrary and capricious standard applies without consideration of conflict to all claims because benefits are paid from a trust then *a fortiori* the highly deferential standard of review is the only standard of review in pension cases. *Contra Bruch*, 489 U.S. at 109 (rejecting administrative law analogy and refusing wholesale incorporation of the highly deferential standard of review).

Not all benefits, not all claims, not all funds held in trust, and not all trusts are created equal. All qualified pension plans covered under ERISA must by statute hold funds in a non-reversionary trust for the benefit of HCEs and nonHCEs alike. *See* 26 U.S.C. §§ 401(a)(2) & (4); 26 C.F.R. §§ 1.401-2. . "A trust forming part of a defined benefit plan shall not constitute a *qualified* trust under [26 U.S.C. § 401] unless the plan provides that forfeitures must not be applied to increase the benefits any employee would otherwise receive under the plan." 26 U.S.C. § 401(a)(8). "In a trust there is a separation of interests in the subject matter of the trust, the beneficiary having an equitable interest and the trustee having an interest which is normally a legal interest." RESTATEMENT (SECOND) OF TRUSTS, § 2, at 9 (1959); *id.* § 74, at 192 (beneficiary has equitable interest in the trust). Participants in defined benefit pension plans have a vested beneficial interest in

the funds held in trusts once all the service requirements under the plan have been fulfilled. 29 U.S.C. § 1001(1); 29 U.S.C. §§ 1051-54.

Petitioner and other "working class" former employees who have met the service requirements under the plan are the cestui que trust as are HCEs. There is a good faith requirement that forbids action on the part of a fiduciary without the knowledge and consent of his cestui que trust especially when the fiduciary has an interest or when the fiduciary's interest is in conflict with that of the person for whom he acts. Transactions between an ERISA trustee and his cestui que trust are subject to the same scrutiny, intendments and imputations as between an ordinary trustee and his cestui que trust. The employer-administrator breaches his fiduciary duty to participants violating ERISA when it takes actions to cause forfeiture of "working class" participants' property in its self-interest. 29 U.S.C. §§ 1051-2; 29 U.S.C. §§ 1053(a)(2)(A) & (C); 29 U.S.C. §§ 1053(b)(1) & (b)(2); 29 U.S.C. §§ 1053(c)(1)(A) & (c)(1)(B); 29 U.S.C. § 1054(g)(1); 29 U.S.C. § 1140; *see also* (App. J).

This Court recognized as early as 1823 that not even a revolution could cause forfeiture of property held in trust. *The Society of the Propagation of the Gospel in Foreign Parts v. The Town of New-Haven et al.*, 21 U.S. 464 (1823). Notwithstanding that ruling, the Eleventh Circuit has accomplished that which the Vermont legislature and a revolution could not— the forfeiture of property held in trust.

Id. Finding jurisdiction over the appeal based on equitable jurisdiction the Court deemed Petitioner's individual claim under Section 502(a)(3) for equitable relief to be a legal claim vacating the award of Petitioner's accrued benefit. *Twist et al. v. Prairie Oil & Gas Company,* 274 U.S. 684 (1927)("It was error to declare that this proceeding, which is a bill in equity in its nature as well as in its form, and which seeks relief that only a court of equity can give, shall be deemed an action at law"); *Perego v. Dodge*, 163 U.S. 160 (1896)("Even a defendant, who answers and submits to the jurisdiction of the court, and enters into his defence at large, is precluded from raising such an objection on appeal for the first time"); *Gilley v. Monsanto Company, Inc.,* 490 F.3d at 861 (reversing lower court's award of equitable relief under Section 1132(a)(3) based on actual conflict of interest and unreasonable decision finding claim was a legal claim because defined benefit pension plan was freely amendable at the company's discretion regardless of ERISA's vesting standards and prohibition against forfeiture). In a subsequent action, the Eleventh Circuit recognized that relief involving a money award based on a fiduciary's equitable lien is not a legal claim. *Administrative Comm. for Wal-Mart Stores, Inc. v. Horton,* 513 F.3d 1223 (11th Cir. 2008)(court recognizing a company's right to "appropriate equitable relief" and restitution under Section 1132(a)(3) under insurance subrogation clause); *Sereboff,* 547 U. S. at *13 (recognizing equitable lien by agreement of parties on identifiable fund).

II. Review Is Warranted To Resolve A Conflict In The Circuits Concerning The Proper Standard Of Review To Be Applied In Suits Brought Under ERISA Section 502(a)(3).

The First, Second, Fifth, Seventh, Eighth, and Ninth Circuits have all applied a *de novo* standard of review in suits for breach of fiduciary duty and violation of ERISA, reasoning suits of this nature involve questions of law and statutory interpretation properly resolved by courts. *See e. g. La Rocca v. Borden, Inc.* 276 F.3d 22, 26 (1st Cir. 2002); *Coan v. Kaufman*, No. 04-5173 (2nd Cir. 2006) citing *Burke v. Kodak Retirement Income Plan,* 336 F.3d 103, 111 (2d Cir. 2003), *cert. denied,* 540 U.S. 1105 (2004); *Wilkins v. Mason Tenders District Council Pension Fund,* 445 F.3d 572, 581 (2nd Cir. 2006) citing *Long v. Flying Tiger Line, Inc. Fixed Pension Plan for Pilots,* 994 F.2d 692, 694 (9th Cir.1993); *Rhorer v. Raytheon Eng'rs & Contractors Inc.,* 181 F.3d 634, 639 (5th Cir. 1999)(applying *de novo* standard to question of law for breach of fiduciary duty under Section 502(a)(2); *Silvernail v. Ameritech Pension Plan*, 439 F.3d 355 (7th Cir. 2006) citing *Small v. Chao*, 398 F.3d 894, 897 (7th Cir. 2005); *Calhoon v. Trans World Airlines, Inc.* 400 F.3d 593 (8th Cir. 2005) citing *Parke v. First Reliance Standard Life Insur. Co.*, 368 F.3d 999, 1006 (8th Cir.2004); *Mathews v. Chevron Corp.*, 362 F.3d 1172 (9th Cir. 2004) citing *Shaver v. Operating Eng'rs Local 428 Pension Trust Fund*, 332 F.3d 1198, 1201 (9th Cir. 2003).

Separate panels of the Sixth Circuit applied a *de novo* standard of review and an arbitrary or capricious standard to claims brought under Section 502(a)(3). *See Simpson v. Ernst & Young*, 100 F.3d 436 (6th Cir. 1996)(applying *de novo* standard of review) citing *Schwartz v. Gregori*, 45 F.3d 1017, 1021 (6th Cir.), certiorari denied, 116 S. Ct. 77 (1995); *but see Hunter v. Caliber System*, 220 F.3d 702 (6th Cir. 2000)(expressly rejecting the *de novo* standard of review).[14]

A. The Employer-Administered Plan And The Conflict of Interest.

Critical to these proceedings is the Respondents' conflict of interest[15] and the reorganization of Old Monsanto into its three separate business lines and the division of assets from Old Monsanto's trust

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[14]The Third Circuit in *Jordan v. Federal Exp. Corp.*, 116 F.3d 1005 (3rd Cir. 1997) recognized that the deferential standard "only applies to actions brought under § 1132(a)(1)(B) and not those brought under § 1132(a)(3)." *Jordan*, 116 F.3d at fn 8; *Smith v. Sydnor*, 184 F.3d 356 (4th Cir. 1999)(discussing circuit split in regards to whether exhaustion is required under ERISA § 502(a)(3))

[15]The District Court in the first instance stated "[a] significant issue with regard to the partial final judgment may be whether the following statement of the defendants, if correct in some instances, has application to a defendant with a conflict of interest. "Although federal regulations recognize a permitted equivalency that uses 870 Hours of Service as the threshold, the regulation is clear that it is for the Plan, and not individual participants, to elect the equivalency of its choice. *See* C.F.R. § 2530 200b 3(a)." (App. F 49a).

into different "cash-balance" plans.[16] Solutia, Pharmacia, and New Monsanto Company's "cash balance" benefit plans were funded from assets formerly held in Old Monsanto's Trust. Because Old Monsanto promised retirees life time medical benefits and because Old Monsanto did not report terminated "working class" participants with an entitlement to a separated deferred vested accrued benefit the assets held in trust were not sufficient to cover all promised benefits.[17] [R 167-170].

Solutia filed a class action seeking a declaratory judgment to establish retirees' rights to health and pension benefits excluding participants of the 1976 plan. *Solutia, Inc. v. Forsberg*, 98-cv-00237-3 RV and 99-00168-cv-3-RV Northern District of Florida Pensacola Division. A settlement was reached with retirees receiving higher pension benefits and lifetime medical benefits resulting in Solutia's "cash-balance" plan being 70% underfunded.

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[16]"[T[he division of an empire works no forfeiture of rights previously acquired." *The Society of the Propagation of the Gospel in Foreign Parts v. The Town of New-Haven et al.* 21 U.S. at 473.

[17]Although ERISA requires it, Old Monsanto did not report "working class" participants who it terminated with a deferred vested accrued pension benefit on the plan's annual returns or provide them with annual benefit statements. [R 68; 167]. Because Respondents stipulated Petitioner was vested if he had 1000 hours of credited service the record reflected only that the 1981 Plan was adopted after Gilley and others were on layoff, after April 1, 1981, and that the plan administrator reported the amendment did not have an effect on *any* participant's accrued benefit, and accordingly, the significance of the conversion to "cash balance" plans was never raised. (App. J); [HEx.12].

Solutia then filed for bankruptcy protection allegedly seeking to reject the separation agreement and to discharge liability for pension benefits. *In re: Solutia Inc et al.* Case No. 03-17949 (PCB) Bankruptcy Court Southern District of New York. After the Eleventh Circuit published its decision Solutia, Pharmacia, New Monsanto, and the *Forsberg* Retiree Committee entered into new agreements wherein New Monsanto and Pharmacia reacquired an ownership interest in exchange for financial assistance to Solutia to exit bankruptcy. [R 177-2]. A motion to join Solutia as a necessary party was denied as moot by the District Court in the second instance when the case was dismissed for lack of subject matter jurisdiction.[18] (App. C fn 10 at 14a & App. D 23a-24a).

1. Executives, Officers, and Other HCEs and IRS Regulations.

The IRS places restrictions on the amount of funds that can be held in qualified "tax favored" plans. IRS Publication 575 at http://www.irs.gov. Old Monsanto like many other companies established nonqualified "unwritten" pension plans for its top executives, officers, and employees. *Id.* Funds for both nonqualified and qualified plans were held in a collective trust under a Master Trust

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[18]New Monsanto's plan administrator claimed there were no pay records for this timeframe, but during the pendency of the first appeal personnel at the Solutia plant in Decatur, Alabama shredded records from the Sand Mountain plant stored there since the plant closed in 1981. [R 170].

Agreement. [R 162-2, 167-22 at p. 10]. The non-reversionary trust is nothing more than a minimum balance bank account with tax advantages. If liability for promised pension benefits to "working class" participants who were never reported can be eliminated, the funds held in trust are available for executives, officers, and highly compensated employees i.e. "trustees" of the plan, as nonqualified benefits. Old Monsanto's trust did not constitute a qualified trust under 26 U.S.C. § 401 because forfeitures were applied to increase the benefits HCEs received under the plan. 26 U.S.C. § 401(a)(8).

2. Legal Pitfalls

The Eleventh Circuit's ERISA jurisprudence effectively closes the federal courthouse door to ERISA participants wrongfully denied their property by creating a legal minefield to prevent appropriate "equitable" or "make-whole" relief. *Compare Burroughs v. BellSouth Telecomms, Inc.*, ___ F.3d ____, 2009 U.S. App. LEXIS 8145 (11th Cir. April 15, 2009) citing *Ogden v. Blue Bell Creameries U.S.A., Inc.*, 348 F.3d 1284 (11th Cir. 2003); *Katz v. Comprehensive Plan of Group Insur.*, 197 F.3d 1084 (11th Cir. 1999)(claims for breach of fiduciary duty under Section 1132(a)(3) are barred under either a theory of issue or claim preclusion when a claim under 1132(a)(1)(B) is not arbitrary or capricious) and *Gilley v. Monsanto Company, Inc.*, 490 F.3d 848 (11th Cir. 2007)(overturning District Court's finding of an actual conflict of interest because pension benefits are paid out of

trust mandating application of the arbitrary and capricious standard as a matter of law). In other words, in the Eleventh Circuit all claims under Sections 502(a)(2) & (3) are either nonexistent or a matter of the defendants' discretion.[19] *But see* RESTATEMENT (SECOND) OF TRUSTS, § 205, at 458 cmt. a (equitable relief is available to redress breach of fiduciary duty when it restores the beneficiary to "the position he would have been if the trustee had not committed the breach of trust."); 76 Am. Jur. 2d Trusts § 667 (2002); *MetLife*, 128 S. Ct. at 2346; *Varity*, 516 U.S. at 504-6; *Heinz*, 541 U.S. at 744; *Bruch*, 489 U.S. at 109; RESTATEMENT (FIRST) OF RESTITUTION §§ 1, 40, 160, 161, 198 (1937).

The employer-administrator's self-interest is the *sin qua non* of protracted ERISA litigation because participants, entitled to only "make-whole" relief, have no incentive to litigate. Respondents, armed with precedent supporting forfeiture, can deny all "working class" participants' of the 1976 plan their separated deferred vested accrued benefit. (App. E & J). *Compare e. g. Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979) citing *Blonder-Tongue Laboratories, Inc. v. University of Illinois*

[19]The first proceedings in equity in the "Court of Chancery, based largely upon existing inadequacies of the common law courts, was exercised in cases in which a fiduciary had failed to perform his duties . . . in cases in which a person by fraud, mistake or duress had been deprived of property which he could not regain by the ordinary legal remedies then available." RESTATEMENT (FIRST) OF RESTITUTION (1937)(Introductory Note).

Foundation, 402 U. S. 313, 326-8 (1971)(holding the doctrine of mutuality no longer valid and condoning the use of defensive collateral estoppel or *res judicata*) and *Heptinstall v. Monsanto Company, Inc.* et al. 4:06-cv-01564 Northern District of Alabama Middle Division (dismissed on ground of defensive collateral estoppel, appeal pending).[20] By ensuring forfeiture under the 1976 plan Respondents are guaranteed forfeiture of all "working class" participants' vested accrued benefits because future claims for "equitable relief" brought by participants terminated under later amendments will be easily cutoff by time limitations. *See* 29 U.S.C. § 1109; 29 U.S.C. § 1113 (establishing statute of limitations for fiduciary's breach of duty); 29 U.S.C. §§ 1362 to 1369; RESTATEMENT (FIRST) OF RESTITUTION §§ 148, 179 (1937); [R 180]; *but see In re: Unisys Corp., Retiree Medial Benefit Litigation*, 242 F.3d 497 fn3 (3rd Cir. 2001)(Mansmann, Circuit Judge concurring in part). By terminating "working class" participants' right to their vested accrued benefit forfeited assets formerly held in Old Monsanto's Trust are available to be paid out as nonqualified benefits to executive and officers of the company, i.e. trustees. *See Miller v. Pharmacia Corp.*, 4:04-cv-00981 RWS, Eastern District of Missouri-Eastern Division; *Forsberg*, 98-cv-00237-3 RV and 99-00168-cv-3-RV.

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[20]The seven *Heptinstall* plaintiffs just recently became eligible for an early retirement benefit at fifty-five years of age. Pharmacia, Solutia, and New Monsanto Company no longer inform participants of the status of their pensions when benefit inquiries are made. *Heptinstall* at Doc. 112-3.

III. Review Is Warranted To Clarify Whether The Highly Deferential Standard of Review Has Been Incorporated Wholesale Into ERISA Foreclosing The Promise of Ready Access To Federal Courts And Equitable Jurisdiction.

This Court has presented reviewing courts with mixed signals, resulting in a split in the circuits regarding the availability of "appropriate equitable relief" under Section 1132(a)(2) and Section 1132(a)(3) and the scope of discretion afforded defendants in ERISA actions. Recently, in *MetLife,* this Court urged reviewing courts to consider the structural conflict of interest as a factor when reviewing benefit decisions without setting hard and fast rules.[21] *Metlife*, 128 S. Ct. 2343. However, in *LaRue,* Chief Justice Roberts cautioned reviewing courts to consider claims for breach of fiduciary duty and violation of ERISA as discretionary claims citing the need for judicially created safeguards such as exhaustion. *LaRue*, 128 S. Ct. at 1028 (Roberts, Chief Justice concurring in the opinion).

Equally important, if not more so, is the need for reviewing courts not to recast proper claims for equitable relief under Section 1132(a)(2) & (3) as mere discretionary claims. (App. E & J). Unregulated pension plans may easily become

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[21] Justice Scalia dissenting in *MetLife* stated unreasonableness *alone* suffices to establish an abuse of discretion." *MetLife*, 128 S. Ct. at 2350 (Scalia, J. dissent).

Ponzi schemes when, at maturity, payments for promised benefits exceed incoming payments by current participants resulting in the pension plan becoming severely underfunded.[22] When a pension plan reaches maturity in a state of underfunding, trustees of the plan— officers, executives, shareholders, and other HCEs of the company who act as "trustees" of the plan — have a strong incentive to cast off liability to the least economically advantaged participants. Companies enjoying super preemption and a uniform federal common law can engineer a forfeiture of "working class" participants' accrued benefits, while HCEs are able to recover all of their benefits when the highly compensated plan administrators enjoy near absolute discretion.

Recognizing ERISA's explicit paramount goal of protecting promised benefits, and the fact that a single determination can have defensive collateral estoppel effect in subsequent legal actions, should reviewing courts afford ERISA defendants who have abused their discretion *carte blanche* control over litigation, freely permitting them to recast proper breach of fiduciary duty and violation of ERISA claims as discretionary claims for legal relief? (App. J). *Compare Miller*, 4:04-cv-00981 (court, citing ERISA's prohibition against the retroactive denial of benefits, awarded millions to Old Monsanto's former top executives and

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[22]This is especially true in situations where the plan administrator fails to report participants of the plan who are terminated with vested accrued benefits as occurred in the instant case. [R 167-169].

defendants settled for millions of dollars more with no appeal);[23] *Forsberg*, 98-cv-00237-3 RV and 99-00168-cv-3-RV and *In re*: *Solutia Inc et al.* Case No. 03-17949 (PCB) (declaratory action and settlement with current retirees receiving higher pension benefits and lifetime medical benefits with the company paying all representation fees); *Gilley*, 04-cv-0562 (class action for "equitable relief" recast as discretionary claim for benefits establishing precedent for forfeiture), and; *Heptinstall*, 4:06-cv-1562 (dismissed under Rule 12(b)(6) on ground of issue or claim preclusion based on *Gilley* without discovery and without addressing motion for sanctions for destruction of evidence).[24]

The *Miller* and *Forsberg* litigation stand in stark contrast to the results of the instant action where Respondents, after stipulating Petitioner was vested if he proved he had performed 1000 hours of service for 1972, nonetheless, rescinded their stipulation after the District Court found in Gilley's favor; Respondents then appealed the award of Petitioner's accrued benefit. *Id;* (App. J). Old Monsanto's trust, which formed part of the

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[23]In *Miller* plaintiffs were top executives and employees of Old Monsanto who went to work for Solutia who filed an action for nonqualified benefits when Solutia entered bankruptcy protection. Doc. 231.

[24]Counsel for the class of "working class" participants has no arrangement with Respondents. "Working class" participants terminated from the Sand Mountain plant separated with a deferred vested accrued benefit of approximately two hundred dollars per month payable at retirement age. [R 64 Exh B App 1].

defined benefit plan, was not a qualified trust under IRS regulations because forfeitures inured to the benefit of the *Miller* plaintiffs and *Forsberg* retirees increasing their pension benefits. 26 U.S.C. § 401(a)(8); 26 C.F.R. §§ 1.401(a)(4)-1(b)(2),(3),(4),(10),(11).

The dual statutory design of pension regulation provides ample rewards for companies that choose to provide benefit plans and no threat of meritless suits if procedural safeguards are followed. In addition to the judicially created doctrine of exhaustion there is also statutory protection under ERISA § 502(h) and procedural safeguards incorporated into the Federal Rules of Civil Procedure "FRCP" to terminate meritless suits. Contrary to the often spouted cry from companies that they need protection, the real question here is whether there is adequate judicial oversight to prevent sponsors of pension plans from effectively "taking" the property of "working class" participants, creating Constitutional concerns. Opening the courthouse door to participants seeking a review of an improper denial under the court's equitable jurisdiction will promote compliance with ERISA's mandates and reduce the number of improperly motivated suits filed by self-interested benefit providers in their profit interest.

Petitioner, as an individual and class representative, properly brought claims for violation of ERISA and breach of fiduciary duty

under the court's equitable jurisdiction.[25] [R 35]. In equity, a lien upon or interest in property created by contract or by contribution to its value by labor or material is distinguishable from a legal claim, and a right in equity can be established by statute if the parties assent to abrogation of their Seventh Amendment right to a jury trial.[26] *Scott v. Neely*, 140 U.S. 106, 109-10 (1891). Federal Rules of Civil Procedure 18 permits joinder of claims for equitable and legal relief in civil suits. Fed. R. Civ. P. 18 comment 2; *see also Dairy Queen, Inc. v. Wood,* 369 U.S. 469 (1962)(discussing concurrent jurisdiction of federal court's); *see also* Federal Rules of Civil Procedure 8 requiring only a short and plain statement of the grounds for the court's jurisdiction. Fed. R. Civ. P. 8.

Congress expressed a clear intent to provide participants with a right to "equitable relief" when there has been a breach of fiduciary duty, when the plan or ERISA has been violated, and to obtain equitable relief to redress such violation or enforce ERISA or the plan. 29 U.S.C. §§ 1132(a)(2) & (3). By voluntarily providing benefit plans ERISA defendants assent to plenary suits in equity for

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[25]Petitioner stressed that his claims were proper under Section 1132(a)(2) and (3) because he was not entitled to his accrued benefit without a finding that ERISA had been violated and/or there had been a breach of fiduciary duty. (App. J 67a).

[26]Respondents moved to strike Petitioner's jury demand based on the equitable character of Petitioner's claims, but then argued the court's review was limited to a discretionary claim for benefits on the administrative record. (App. J) & [R69, 77-81].

make-whole relief. *Sc tt,* 140 U.S. at 1013. Contractual discretion is reserved for qualified plans that are in complete compliance with ERISA's mandates at inception and in operation. Nothing in the ERISA statute permits defendants *carte blanche* discretion to recast equitable claims under Section 502(a)(2) & (3) as discretionary claims. 29 U.S.C. §§ 1132(a)(2) & (3); *see also* (App. J). Although reviewing courts in ERISA cases initially applied the arbitrary or capricious standard of review taken from the administrative law realm, this Court made it clear in *Bruch* this standard is not to be incorporated wholesale into ERISA. *Bruch*, 489 U.S. at 109. Reviewing courts should not afford deference to employer-administrators who have reserved discretion in their own self-interest when there has been an abuse of discretion. *DeBartolo Corp. v. Florida Gulf Coast Trades Council,* 485 U.S. 568 (1988)(courts do not afford deference to administrative agency when constitutional issues exist). Permitting broad deference to ERISA defendants once procedural safeguards have been met strays from trust law concepts of strict scrutiny of conflict-tainted transactions. The economic realities of litigation are stacked against "working class" participants. Fortune 500 companies such as Respondents with near unlimited resources can litigate indefinitely, eliminating *de facto* the right to redress ensuring the 'taking' of property. Respondents, by abusing the discretion afforded under *Bruch* and ignoring ERISA, converted an alleged qualified defined benefit pension plan into a tax-free Ponzi scheme for the benefit of executives,

officers, and shareholders of the company. [R 167-170]. When the "existing distribution of economic benefits is not just, then the results of the private contracting may reflect not the voluntary arrangement that maximizes the joint interests of both parties, but the imposition of exploitative terms by the more powerful party on the more vulnerable party." Donald Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law: With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MARYLAND L. REV. 563 (1982).

The Eleventh Circuit strayed far from general trust principles of scrutinizing a conflict-tainted decision based on a legal fiction. The highly deferential standard of review without judicial scrutiny invites abuse of discretion allowing unscrupulous trustees to manipulate benefit plans in their own self-interest. Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony Of ERISA*, HASTINGS LAW JOURNAL, Vol 61 No. 2 2009. The culminating effect of the Eleventh Circuit's decision is the wholesale incorporation of the highly deferential standard of review into all of ERISA, inviting the unregulated conversion of pension plans on a wide scale basis. This Court should grant the petition and clearly define the scope of discretion afforded conflicted trustees when there has been a clear abuse of discretion.

CONCLUSION

Petitioner, Wendell F. Gilley, as an individual and class representative, for all the reasons set forth above respectfully submits that the writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-13646-EE

[Filed February 3, 2009]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff(s)-Appellant(s),	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation	)
Defendants-Appellees,	)

Before MARCUS, KRAVITCH and ANDERSON, Circuit Judges.

PER CURIAM:

ORDER

After oral argument and careful consideration, we conclude that the judgment of the district court is due to be affirmed. We conclude that plaintiff cannot circumvent the law of the case established in Gilley v. Monsanto Co., Inc., 490 F.3d 848 (11thCir. 2007). Therefore, plaintiff's claims in Count I and V are foreclosed. With respect to his claim based upon new evidence, we conclude that the evidence is not new, and that plaintiff had ample opportunity to present that evidence in the hearing before the district court prior to the first appeal. Nor is there any other meritorious exception to the law of the case. With respect to plaintiff's claims in Counts II, III and IV, plaintiff's initial brief on appeal failed to preserve the claims, and in any event the claims are without merit.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08-13646-EE

[Filed April 6, 2009]

WENDELL F. GILLEY, an individual and as class representative,

Plaintiff(s)-Appellant(s),

v.

MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation

Defendants-Appellees,

Before MARCUS, KRAVITCH and ANDERSON, Circuit Judges.

PER CURIAM:

ORDER

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are **DENIED**.

ENTERED FOR THE COURT:

R. Lanier Anderson

UNITED STATES CIRCUIT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

No. 04-0562

[Filed June 12, 2008]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff(s),	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation	)
Defendants.	)

BEFORE: C. Lynwood Smith, UNITED STATES DISTRICT JUDGE

MEMORANDUM OPINION

Plaintiff was ordered to show cause why this action should not be dismissed for lack of jurisdiction based on the opinions of the Eleventh Circuit in *Gilley v. Monsanto Co., Inc.*, 490 F.3d 848 (11th Cir. 2007), holding that plaintiff did not vest under the terms of his employer's pension plan *prior* to the termination of his employment, and the former Fifth Circuit in *Nugent v. Jesuit High School of New Orleans*, 625 F.2d 1285, 1287 (5th Cir. 1980),[1] holding that "a former employee whose pension benefits were not vested at the time of [his] termination . . . is not a 'participant' [under ERISA]."[2] *See also Jackson v. Sears, Roebuck and Co.*, 648 F.2d 225, 228-29 (5th Cir. 1981) (agreeing with *Nugent*).

Plaintiff responded to the show cause order with a number of arguments that can be distilled into two distinct themes: (1) *Nugent* is no longer an accurate statement of Eleventh Circuit law in light of the Supreme Court's holding in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and Eleventh Circuit decisions handed down subsequent to *Firestone*; and (2) the *Gilley* decision

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[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[2] *See* doc. no. 189 (May 21, 2008 show cause order).

should not be followed by this court under exceptions to the law of the case doctrine. Neither of these positions has merit, and this action is due to be dismissed because of plaintiff's lack of standing to pursue ERISA claims.

As noted by this court in its May 21, 2008 show cause order,

> "[t]he only parties that have standing to sue under ERISA are those listed in the civil enforcement provision of ERISA, codified at 29 U.S.C. § 1132(a)." *Hobbs* [*v. Blue Cross Blue Shield of Alabama*], 276 F.3d [1236,] at 1240 [(11th Cir. 2001)] (citing *Cagle v. Bruner*, 112 F.3d 1510, 1514 (11th Cir. 1997) (same)). An action seeking relief under ERISA can only be brought by a participant," a "beneficiary," or a "fiduciary" of an ERISA plan; or, in certain instances, by the Secretary of the United States Department of Labor. *See* 29 U.S.C. § 1132(a).[3]

Plaintiff insists that, by virtue of the Supreme Court's holding of *Firestone*, he is a "participant" under the relevant ERISA plan based on his allegations in this lawsuit, and that, as such, he has standing to sue under ERISA. ERISA defines a "participant" as:

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[3] Doc. no. 189 (show cause order) at 5 6.

> any employee or former employee of an employer, or any member or former member of an employee organization, *who is or may become eligible to receive a benefit* of any type *from an employee benefit plan* which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7) (emphasis supplied).

Plaintiff argues that the Supreme Court's holding in *Firestone* is inconsistent with and, thus, overturns the former Fifth Circuit's prior holding in *Nugent* — a case indicating that plaintiff is not a "participant." This court finds that there is no inconsistency between *Firestone* and *Nugent*. *Firestone* provides the definitive analysis of the "may become eligible to receive a benefit" language in 29 U.S.C. § 1002(7), and held that a former employee is a "participant" only if he or she has a reasonable expectation of returning to covered employment, or has a colorable claim that he or she will fulfill eligibility requirements in the future. *See* 489 U.S. at 117-18 ("In order to establish that he or she 'may become eligible' for benefits, a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future."). Here, plaintiff does not meet either criterion.

Specifically, plaintiff argues that he has a colorable claim for benefits by virtue of his allegations that he is a "participant" of the Monsanto Company Salaried Employees' Pension Plan.[4] Stated differently, plaintiff asserts that he is a "participant" because he claims it to be so. His argument, however, runs contrary to key components of the *Firestone* decision. In *Firestone*, the Supreme Court specifically rejected the notion that 29 U.S.C. § 1132 "should be read to mean that a civil action may be brought by someone who *claims to be a participant*," and found that such an "interpretation of the term 'participant' . . . strays far from the statutory language." *Firestone*, 489 U.S. at 117 (emphasis supplied). "To say that a 'participant' is any person who claims to be one begs the question of who is a 'participant' and renders the definition set forth in § 1002(7) superfluous." *Id.*

> In our view, the term 'participant' is naturally read to mean either 'employees in, or reasonably expected to be in, currently covered employment,' *Saladino v. I.L.G.W.U. National Retirement Fund*, 754 F.2d 473, 476 (2nd Cir. 1985), or former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to *vested* benefits. *Kuntz v.*

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[4] *Nota bene*: Plaintiff does not, and indeed cannot under the facts of this case, argue that he has a reasonable expectation of returning to covered employment.

> *Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986) [(*abrogated by Kayes v. Pacific Lumber Co.*, 51 F.3d 1449 (9th Cir. 1995)].

Id. (emphasis supplied).

Further, *Firestone* makes it clear that a former employee who does not have "a colorable claim to *vested* benefits . . . simply does not fit within the [phrase] 'may become eligible.'" *Firestone*, 489 U.S. at 118 (quoting *Saladino*, 754 F.2d at 476) (brackets in original) (emphasis supplied).[5] The holding in *Firestone*, therefore, does not appear to be inconsistent with *Nugent*, which provides that a plaintiff who did not vest under the terms of an ERISA benefits plan prior to the termination of his or her employment is not a "participant" under ERISA. *See Nugent*, 625 F.2d at 1287.

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[5] Justice Scalia, in his concurring opinion in *Firestone*, noted that

> the phrase "may become eligible" has nothing to do with the probabilities of winning a suit. I think that, properly read, the definition of "participant" embraces those whose benefits have vested, and those who (by reason of current or former employment) have some potential to receive the vesting of benefits in the future, but not those who have a good argument that benefits have vested even though they have not.

489 U.S. at 119 (Scalia, J. concurring).

Further, contrary to plaintiff's position, *Nugent* has not been overruled by either the United States Supreme Court or the Eleventh Circuit, and it remains authority binding upon this court. Plaintiff directs this court to *Smith v. Wynfield Development Co., Inc.*, 238 Fed. Appx. 451 (11th Cir. 2007),[6] and *Lyons v. GeorgiaPacific Corp. Salaried Employees Retirement Plan*, 221 F.3d 1235, 1240 n.8 (11th Cir. 2000), as the basis for his argument that "standing in the Eleventh Circuit is no longer dictated" by *Nugent*.[7] Plaintiff's reliance on *Smith* and *Lyons* is wholly misplaced, however, because neither *Smith* nor *Lyons* addresses the issue that was before the former Fifth Circuit in *Nugent*, nor provides any discussion or mention of *Nugent*.

In *Smith*, the Eleventh Circuit addressed the question of whether a district court had subject matter jurisdiction because of ERISA preemption over a lawsuit in which only state law claims were asserted. *See* 283 Fed. Appx. at 454-58. In reaching its conclusion on the jurisdictional question, the Court determined, on the basis of the following rationale, that the appellant was a "participant" under the terms of an ERISA health insurance plan:

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[6]"Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority." 11th Cir. R. 36-2. *Smith v. Wynfield Development Co., Inc.* was designated by the Eleventh Circuit as an unpublished opinion. *See* 238 Fed. Appx. at 451.

[7]Doc. no. 91 (plaintiff's response to May 21, 2008 show cause order) at 7-8.

> Smith has standing to sue as a "participant" of the health insurance plan. . . . Here, Smith alleged that she was eligible to receive group health insurance benefits based on her employment, but that she was denied those benefits because of Defendants' failure to enroll her properly. If Smith's allegations are true, she may become eligible to receive the benefits of the group health plan to which she was otherwise entitled. Thus, based on her allegations, we conclude that Smith is a "participant" in the relevant ERISA plan, even though she was never properly enrolled in the plan. Smith cannot avoid ERISA preemption simply by stating that she was never properly enrolled in the plan, when the failure to enroll her properly is the very fact that gives rise to her cause of action.

Smith, 283 Fed. Appx. at 457. Plaintiff does not develop his argument that *Smith* overturns *Nugent*, and this court will not give consideration to arguments that are not fully developed or bolstered with legal authority. *See U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1287 n 13 (11th Cir. 2007) (refusing to address a party's "perfunctory and underdeveloped argument"). Nevertheless, this court finds that the issue before the Eleventh Circuit in *Smith* has nothing whatsoever to do with

the holding in *Nugent*, and that *Smith* cannot be read to abrogate *Nugent*.[8]

Further, unlike plaintiff in the present case, the plaintiff in *Lyons* was vested under the terms of the relevant ERISA plan prior to the termination of his employment. *See Lyons*, 221 F.3d at 1239 ("On January 5, 1991, Lyons left employment at Georgia-Pacific. In accordance with Article 4 of the Plan, Lyons was entitled to a vested benefit, because he had worked for Georgia-Pacific and Great Northern for at least five years."). For that reason, *Lyons* is distinguishable from *Nugent*, and cannot be construed as overruling *Nugent*.

Insofar as plaintiff invites this court to depart from the Eleventh Circuit's holding in *Gilley*, this court declines to do so. Plaintiff argues that there are certain scenarios that might appropriately give a district court cause to deviate from the law of the case doctrine;[9] however, the cases cited by plaintiff in support of this proposition involve situations where the *Eleventh Circuit*, *not* a district court, set aside the law of the case doctrine and revisited a

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[8]This is especially true in view of the well-settled rule quoted in note 6 *supra*.

[9]The doctrine of the law of the case mandates that "an appellate court decision on an issue . . . be followed in all subsequent trial court proceedings in the same case." *United States v. White*, 846 F.2d 678, 684 (11th Cir. 1988). "The purpose of the law of the case doctrine is to bring an end to litigation. In addition, it ensures that district courts obey appellate courts and that the parties are not required to relitigate settled issues." *Id.* at 684-85 (citing *Leggett v. Badger*, 798 F.2d 1387, 1389 (11th Cir. 1984)).

prior Eleventh Circuit holding on an issue of law or fact in a particular case. *See Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1292 (11th Cir. 2005) (conceding that there are certain circumstances whereby an appellate court may stray from the law of the case doctrine); *Klay v. All Defendants*, 389 F.3d 1191, 1197-98 (11th Cir. 2004) (same); *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1139-40 (11th Cir. 1984) (same, and noting that the law of the case doctrine is an "amorphous concept"). Contrary to plaintiff's argument, it is well-settled that, "[o]n remand a district court is not free to deviate from the appellate court's mandate." *Wheeler*, 746 F.2d at 1140 n.2. Such is the case here, and this court will not revisit those matters that were decided by the Eleventh Circuit in *Gilley*. With regard to the present case, the Eleventh Circuit held in *Gilley* that plaintiff did not vest under his employer's applicable benefits plan prior to the termination of his employment. *See* 490 F.3d at 858-60. Accordingly, plaintiff is not a "participant," and he lacks standing to sue under ERISA.

Consistent with the May 21, 2008 show cause order and for the reasons discussed herein this case is due to be, and hereby is **DISMISSED** without prejudice due to this court's lack of subject matter jurisdiction.[10] In addition, because this court does

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[10]Defendants assert that, although they agree that plaintiff lacks standing to pursue ERISA claims, this court should table the issue of standing, and should reach a determination as to the merits of plaintiff's remaining claims. Because standing is a jurisdictional issue, and plaintiff does not have

not have subject matter jurisdiction over this action, it lacks the power to rule on the parties' pending motions. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 84 (1998) (noting that when a court lacks subject matter jurisdiction it "cannot proceed at all, but can only note the jurisdictional defect and dismiss the suit."). As such, the clerk is directed to administratively terminate all pending motions, and to close this file. Costs are taxed as paid.

DONE this 12th day of June, 2008.

/s/ LYNWOOD SMITH

UNITED STATES DISTRICT JUDGE

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standing to sue under ERISA, this court lacks the power to make the sort of substantive ruling sought by defendants. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 84 (1998) (mentioning that when a federal court lacks jurisdiction over a controversy, the court cannot take any action other than dismissing the case); *Bischoff v. Osceola County, Florida*, 222 F.3d 874, 877-878 (11th Cir. 2000) (noting that a plaintiff's standing to bring an action is a jurisdictional issue).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

No. 04-0562

[Filed May 21, 2008]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff(s)	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation	)
Defendants.	)

BEFORE: C. Lynwood Smith, UNITED STATES DISTRICT JUDGE

ORDER SHOW CAUSE

The above-styled action is presently before this court on remand from the Eleventh Circuit by *Gilley v. Monsanto Co., In c.*, 490 F.3d 848 (11th Cir. 2007).[1] Plaintiff Wendell F. Gilley seeks relief under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.*, from defendants Monsanto Co., Inc.; Monsanto Company Salaried Employees' Pension Plan; Employee Benefits Plan Committee; Pharmacia Corporation; and Monsanto Company Employee Benefits Executive Committee. Plaintiff asserts numerous ERISA claims as an individual who was allegedly wrongfully denied pension benefits, as a representative of a class of individuals,[2] and on

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[1]During the pendency of the parties' appeal, but prior to the Eleventh Circuit's ruling, the clerk of court reassigned this action to the undersigned judge from Senior United States District Judge Robert B. Propst to whom this case was originally assigned, and who conducted the partial trial on the merits from which defendants appealed. *See* doc. no. 152 (clerk's notice of reassignment).

[2]Consistent with this court's previous orders, plaintiff's class claims are no longer pending, nor will the undersigned revisit the appropriateness of this case for class action status. Plaintiff's motion for class certification was denied long ago, *see* doc. no. 50 (order denying plaintiff's motion for class certification), as was plaintiff's motion to reconsider that denial, *see* doc. no. 115 (order denying plaintiff's motion for reconsideration). It is well-established that "an issue decided at one stage of a case is binding at later stage of the same case." *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1313

behalf of the Monsanto Salaried Employees' Pension Plan (hereinafter "the Plan").

In *Gilley*, the Eleventh Circuit agreed with defendants that they properly denied plaintiff's request for a pension because he did not vest under his employer's applicable benefits plan prior to the termination of his employment. *See* 490 F.3d at 858-60.[3] The Court concluded its opinion by noting that "Gilley raises a host of arguments . . . about why he is equitably entitled to a pension notwithstanding his inability to satisfy the vesting requirements under the 95-hour Rule. The district court did not reach any of these arguments[,] and we decline to take the first swing at them." *Id.* at 860. With the exception of plaintiff's claim under ERISA § 204(g), 29 U.S.C. § 1054, which the Eleventh Circuit expressly disposed of in defendants' favor[4] it is unclear from the Court's

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(11th Cir. 2000) (citing *United States v. Excobar-Urrego*, 110 F.3d 1556 (11th Cir. 1997)).

[3]The Eleventh Circuit's holding in *Gilley* is binding authority in this case. The doctrine of the law of the case mandates that "an appellate court decision on an issue . . . be followed in all subsequent trial court proceedings in the same case." *United States v. White*, 846 F.2d 678, 684 (11th Cir. 1988). "The purpose of the law of the case doctrine is to bring an end to litigation. In addition, it ensures that district courts obey appellate courts and that the parties are not required to relitigate settled issues." *White*, 846 F.2d at 684-85 (citing *Leggett v. Badger*, 798 F.2d 1387, 1389 (11th Cir. 1984)). Accordingly, this court will afford the *Gilley* decision its proper authoritative weight.

[4]The Court held that, because "[t]he ERISA § 204(g) anti-cutback provision does not apply to changes in vesting requirements," Gilley could not sustain an ERISA § 204(g)

mandate which of plaintiff's other claims remain to be adjudicated.

That said, plaintiffs' claims, as they are articulated in his amended complaint, are made solely under ERISA.[5] Upon considering the Eleventh Circuit's holding in this case, this court questions whether plaintiff continues to have standing to assert ERISA claims.

The parties have not raised the issue of standing. However, this court has an obligation to *sua sponte* examine its jurisdiction at any point in the proceedings, and a plaintiff's standing to bring an action is a jurisdictional issue. *See Bischoff v. Osceola County, Florida*, 222 F.3d 874, 877-878 (11th Cir. 2000). In *Bischoff*, the Eleventh Circuit[:]

> emphasize[d] that the district court correctly reached out and considered the question of standing *sua sponte*. As the Supreme Court made clear in *United States v. Hays*, 515 U.S. 737, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995), "[t]he question of standing is not subject to waiver . . . . 'The federal

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claim in that, when the 95-hour rule was adopted, Gilley was a current employee who had not vested, and the Plan's amendment "did not reduce the amount of his accrued benefit or the rate at which he was accruing benefits." *Gilley*, 490 F.3d at 859. It is unknown to this court why the Eleventh Circuit chose to specifically address plaintiff's ERISA § 204(g) claim to the exclusion of all others, however, that claim was nonetheless extinguished by the Court.

[5] *See* doc. no. 35 (amended complaint).

courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines.'" *Id.* at 742, 115 S.Ct. at 2435 (*quoting* If this court lacks subject matter jurisdiction, the court, consequently, lacks the power to rule 4 *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-31, 110 S.Ct. 596, 607-08, 107 L.Ed.2d 603 (1990)) (internal quotation marks omitted); *see also University of South Alabama v. American Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999) (noting that "it is well settled that a federal court is obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking"); *Cuban American Bar Association, Inc. v. Christopher*, 43 F.3d 1412, 1422 (11th Cir. 1995) (explaining that "'[b]efore rendering a decision . . . every federal court operates under an independent obligation to ensure it is presented with the kind of concrete controversy upon which its constitutional grant of authority is based; and this obligation on the court to examine its own jurisdiction continues at each stage of the proceedings, even if no party raises the jurisdictional issue and both parties are prepared to concede it'") (quoting *Hallandale Professional Fire*

> *Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 759 (11th Cir. 1991)); *Alabama v. United States Environmental Protection Agency*, 871 F.2d 1548, 1554 (11th Cir. 1989) (noting that "[s]tanding is a jurisdictional prerequisite to suit in federal court") (citing *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 475-76, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982)).
>
> The party invoking federal jurisdiction bears the burden of proving standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). Moreover, each element of standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.*

Bischoff, 222 F.3d at 877-878. *See also Smith v. GTE Corp.*, 236 F.3d 1292, 1299 (11th Cir. 2001) (holding that because federal courts are without power to act in the absence of subject matter jurisdiction, a court must raise the question of

subject matter jurisdiction *sua sponte* at any point when jurisdiction appears to be in doubt).[6]

Further, the central purpose of the standing requirement is to ensure that parties have a concrete interest in the outcome of the proceedings such that they can be expected to frame the issues properly. *See Harris v. Evans*, 20 F.3d 1118, 1121 (11th Cir. 1994).

The present case presents an unusual set of circumstances, in that the Eleventh Circuit's holding seemingly strips plaintiff of standing to pursue ERISA claims. Despite the Eleventh Circuit's mandate in *Gilley*, directing this court to "take the first swing" at plaintiff's remaining claims, *Gilley*, 490 F.3d at 860, an unavoidable prerequisite to this court's power to make such a substantive determination is that plaintiff has standing under ERISA. *See, e.g., Smith*, 236 F.3d at 1299 (courts cannot act absent subject matter jurisdiction); *Hobbs v. Blue Cross Blue Shield of Alabama*, 276 F.3d 1236, 1240 (11th Cir. 2001) ("standing" under 29 § U.S.C. 1132(a) is required in order for a party to pursue relief under ERISA).

"The only parties that have standing to sue under ERISA are those listed in the civil

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[6]If this court lacks subject matter jurisdiction, the court, consequently, lacks the power to rule on the parties' pending motions. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 84 (1998) (noting that when a court lacks subject matter jurisdiction it "cannot proceed at all, but can only note the jurisdictional defect and dismiss the suit.").

enforcement provision of ERISA, codified at 29 U.S.C. § 1132(a)." *Hobbs*, 276 F.3d at 1240 (citing *Cagle v. Bruner*, 112 F.3d 1510, 1514 (11th Cir. 1997) (same)). An action seeking relief under ERISA, including the sort of "equitable" relief being sought by plaintiff in the present case, can only be brought by a "participant," a "beneficiary," or a "fiduciary" of an ERISA plan; or, in certain instances, by the Secretary of the United States Department of Labor.[7] *See* 29 U.S.C. § 1132(a). There is neither an allegation nor evidence to support that plaintiff is a "beneficiary" or a "fiduciary" under the Plan, and the court takes judicial notice that plaintiff is not the Secretary of Labor. As such, plaintiff must be a "participant" in order to have standing to assert a claim under ERISA, whether on his own behalf or on behalf of the Plan. *See, e.g., Physicians Multispecialty Group v. Health Care Plan of Horton Homes, Inc.*, 371 F.3d 1291, 1294 (11th Cir. 2004) (noting that "participants" have standing to pursue ERISA claims).

ERISA defines a "participant" as[:]

> any employee or former employee of an employer, or any member or former member of an employee organization, *who is or may become eligible to receive a benefit* of any type *from an employee benefit plan* which covers

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[7] "The term 'Secretary' means the Secretary of Labor." 29 U.S.C. 1002(13).

> employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

Physicians Multispecialty Group, 371 F.3d at 1294 n.2 (quoting 29 U.S.C. § 1002(7)) (emphasis supplied).

With regard to the holding of *Gilley* — that plaintiff did not vest *prior* to the termination of his employment — it is the long-standing law in the Eleventh Circuit that "a former employee whose pension benefits were not vested at the time of [his] termination . . . is not a 'participant' [under ERISA]." *Nugent v. Jesuit High School of New Orleans*, 625 F.2d 1285, 1287 (5th Cir. 1980).[8] *See also Jackson v. Sears, Roebuck and Co.*, 648 F.2d 225, 228-29 (5th Cir. June 15, 1981)[9] (agreeing with the holding in *Nugent* and concluding "that the 'may become eligible' language was intended [by Congress] to apply only to current employees."). Accordingly, when considering *Gilley* in light of the authority of *Nugent* and its progeny, plaintiff is not a "participant" under 29 U.S.C. § 1132. It appears, therefore, that plaintiff lacks standing to pursue ERISA claims.

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[8]In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[9]*See* Footnote 22, *supra*.

Accordingly, plaintiff is hereby ORDERED to show cause, in writing, by June 2, 2008, if such cause exists, why this action should not be dismissed for lack of jurisdiction. Defendants are directed to substantively respond to plaintiff's arguments by June 9, 2008.[10] If good cause is not shown, this action will be dismissed.

DONE this 21st day of May, 2008.

/s/ LYNWOOD SMITH

UNITED STATES DISTRICT JUDGE

[10]Defendants were recently ordered to respond to the motion for joinder filed by plaintiff; however, defendants acknowledged the court's order requiring a response, and stated that they took "no position" on plaintiffs' motion. *See* doc. no. 163 (order requiring defendants to respond to plaintiff's motion for joinder); doc. no. 165 (defendants' response to motion for joinder). Such a noncommittal response is, in essence, non-responsive. In the interest of clarity, this order requires that defendants articulate a position when responding to plaintiff's arguments in light of this show cause order, if any are raised by plaintiff.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-13646-EE

[Filed June 28, 2007]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff(s)-Appellant(s),	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation	)
Defendants-Appellees,	)

BEFORE: CARNES, PRYOR, and FARRIS,* Circuit Judges.

CARNES, Circuit Judge:

ORDER

Throughout his judicial career Holmes relished challenging cases. While on Massachusetts' highest court he confessed to a friend that although none of the cases he had handled that year had been of universal interest, "there is always the pleasure of unraveling a difficulty."[1] A decade and a half later, while on the Supreme Court, he told the same friend that he had few cases of general interest that term, but "[t]here is always the fun of untying a knot and trying to do it in good compact form."[2] It is a pity that Holmes did not live to see ERISA cases.

I.

Wendell Gilley was employed by Monsanto Company, Inc. from August 31, 1972 through February 16, 1982 at its Sand Mountain textile

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*Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

[1]Oliver Wendell Holmes, Jr., *Feb. 23, 1890 Letter to Frederick Pollack, in* THE HOLMES-POLLACK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874 – 1932 32, 33 (Mark DeWolfe, ed., Harvard Univ. Press 2d prtg. 1941).

[2]Oliver Wendell Holmes, Jr., *May 25, 1906 Letter to Frederick Pollack, in* THE HOLMES-POLLACK LETTERS, *supra* note 1, at 123, 124.

plant in Northeast Alabama. Monsanto closed the plant in March of 1981, but Gilley remained on the payroll in layoff status until February 1982 when he was finally let go. Although the period of his employment was under nine-and-a-half years, Gilley claims that with the overtime that he worked in 1972, he acquired the necessary ten years of "Vested Service" to merit pension benefits.

Under Monsanto's Salaried Employees' Pension Plan, certain employees are entitled to benefits if they are able to meet the vesting requirements of the plan. Although Monsanto has amended its pension plan several times over the years, all relevant versions of the plan set out the same basic vesting requirements: (1) an eligible employee must reach retirement age, and (2) the employee must acquire at least ten years of "Vested Service." An employee earns a year of Vested Service when he completes 1,000 "Hours of Service," defined as all hours of employment for which an employee is directly or indirectly compensated, during that year. The manner in which Hours of Service are calculated has varied as Monsanto has amended its pension plan.

When Gilley began work at Monsanto, the 1971 Plan was in effect. The pension plan was amended in 1976 to comply with the requirements of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.*, which went into effect,

for our purposes, in 1976.[3] According to Monsanto, both the 1971 Plan and the 1976 post-amendment Plan utilized the "Elapsed Time Method" to calculate Vested Service for pension purposes. Under this method, an employee is credited with the hours that result from dividing the total number of calendar days of employment, including weekends and holidays, by 365 and then multiplying that number by 2,080 (the total hours in a "Standard Work Year" based on a forty-hour work week). In other words, an employee's Hours of Service are determined based on the fraction of the year he is employed, multiplied by the Standard Work Year—if an individual is employed for 176 days out of the year, he would be entitled to 1,002 Hours of Service or one year of Vested Service.

Sometime between 1979 and 1981, the Plan Committee decided to change the way Hours of Service are determined, adopting the "95-Hour Rule" and incorporating it into the amendments to the 1981 Plan. Under this calculation method, the provider credits all employees with ninety-five Hours of Service for each two-week period they are employed, regardless of the actual hours worked. The 95-Hour Rule expressly excludes additional credit for overtime hours, embodying the assumption that the fifteen extra Hours of Service

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[3]The majority of ERISA became effective January 1, 1975, but for all pension plans in existence as of January 1, 1974, of which the Plan here was one, the participation and vesting standards of ERISA became applicable on the first day of the plan year beginning after December 31, 1975, effectively 1976. *See* 29 U.S.C. § 1061(b)(2).

credited on a biweekly basis (assuming a 40-hour week or 80 hours every two weeks) is a fair way to cover any overtime hours worked. In addition to adopting the 95-Hour Rule, the 1981 Plan stated that an employee's benefit rights are to be determined according to the pension plan in effect at the time that the employee separates from Monsanto.

Believing that he had acquired ten years of Vested Service, even though he had only worked for Monsanto for nine full years and part of two other years (1972 and 1982), Gilley applied for pension benefits in 2001. Monsanto denied his request, because it concluded that Gilley's Vested Service fell short of the requisite ten years. Gilley filed an administrative appeal, and the Monsanto Plan Committee denied his petition. It applied the 1981 Plan and the 95-Hour Rule to determine that Gilley was only entitled to 9.594 years of Vested Service.

Gilley filed suit claiming that Monsanto had: (1) arbitrarily and capriciously denied his claim for benefits, in violation of ERISA § 502, 29 U.S.C. § 1132; (2) made oral and written assurances that all employees hired at the Sand Mountain plant after September 1972 were vested and, therefore, is equitably estopped from denying Gilley benefits now under ERISA § 502; (3) intentionally closed the Sand Mountain Plant right before the employees would reach the ten year mark, in violation of ERISA § 510, 29 U.S.C. § 1140; (4) amended the Plan to retroactively reduce or eliminate the amount of accrued Hours of Service in violation of

ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1); and (5) breached its fiduciary duty by failing to act in the best interest of plan participants, in violation of ERISA § 404, 29 U.S.C. § 1104. Monsanto filed a motion to dismiss, arguing that the 1981 Plan governed the determination of Gilley's credit, and that under the plan Gilley lacked the requisite ten years of Vested Service. The district court denied the motion to dismiss.

Gilley then filed an amended complaint, specifically restating all of his claims under the "equitable relief" section of ERISA, § 502(a)(3), 29 U.S.C. § 1132(a)(3), and adding a claim under § 502(c), 29 U.S.C. § 1132(c), and § 510, 29 U.S.C. § 1140, asserting that Monsanto had interfered with his attempts to attain benefits by refusing to provide him with requested documents. The amended complaint alleged that the 95-Hour Rule should not be applied because, according to Gilley, it is less favorable to him than the 1976 Plan's method of calculating Hours of Service.

Monsanto filed a motion for summary judgment, asserting that ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), only permits equitable relief and does not apply when a party is seeking purely legal relief, as Monsanto claimed Gilley was doing.[4]

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[4]Monsanto contends that Gilley cannot properly make out an equitable claim under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), because he is actually seeking legal relief which can only be granted under § 502(a)(1)(b), 29 U.S.C. § 1132(a)(1)(b). Our disposition of this appeal does not require us to decide the nature of the relief Gilley is seeking, and it is

Additionally, Monsanto restated its argument that Gilley cannot prove the ten years of Vesting Service necessary to merit benefits. It put before the court Social Security records indicating that Gilley had earned a total of $2,149.68 in 1972, and other records showing that in 1972 his base salary had been $420 monthly, or $5,040 annually. Gilley argued that the $420 figure actually included overtime pay and that his monthly base salary was really only $390, which would have been $4,680 annually.

Based on all of those records, Monsanto argued that even if the district court calculated Hours of Service based on the actual hours Gilley worked, Gilley still was not entitled to a pension. Using the $2,149.68 figure, a $420 monthly base salary, and the 2,080 hour "Standard Work Year" set out in the 1981 Plan, Monsanto asserted that Gilley could have actually worked only 887.2 hours in 1972 (if all hours were compensated equally), well short of the 1,000 hours needed. Monsanto also pointed out that because the $2,149.68 salary Gilley earned in 1972 included compensation for some overtime and holiday hours, which would have been paid at a

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not a question that goes to the existence of subject matter jurisdiction. *See Blue Cross & Blue Shield of Ala. v. Sanders*, 138 F.3d 1347, 1352 (11th Cir. 1998) (noting that subject matter jurisdiction exists even if the remedy sought under § 502(a)(3) is legal in nature, because a finding that the relief sought is legal in nature "'does not negate the existence of federal subject matter jurisdiction, but rather indicates that [the plaintiff] may have failed to state' a claim upon which relief can be granted" (quoting *Health Cost Controls v. Skinner*, 44 F.3d 535, 537-38 (7th Cir. 1995)).

premium rate, Gilley's actual hours worked would be much less. What's more, even if Gilley's claimed $390 monthly salary figure and the resulting $4,680 annual salary figure are accepted, the maximum it appears Gilley could have worked in 1973 based on the Social Security records is 955.41 hours (assuming all hours were compensated at the same hourly wage). Still, the district court denied Monsanto's motion, finding that a trial was warranted based on the "closeness of the vesting issue."

A two-day bench trial was conducted solely to decide the number of Hours of Service credit Gilley was entitled to receive for his employment in 1972. After trial, the district court ordered Gilley to submit an "itemized, succinct list showing exactly how [he] . . . would arrive at a minimum of 1,000 [H]ours of [S]ervice in 1972." In response, Gilley offered three "equivalencies," claiming that each showed he was entitled to benefits. ERISA gives a plan the option of using equivalencies in order to simplify the record keeping and calculation burdens associated with determining Hours of Service, 29 C.F.R. § 2530.200b-3(a). A list of equivalencies from which a plan may choose is contained in the regulation, id. § 2530.200b-3(d), (e).

The district court accepted two of the three equivalencies that Gilley suggested. One of those two calculates Hours of Service based on "Hours Worked" under 29 C.F.R. § 2530.200b-3(d)(1), granting 1,000 Hours of Service if 870 hours are worked. The other calculates Hours of Service

based on "Regular Time Hours" under 29 C.F.R. § 2530.200b–3(d)(2), granting 1,000 Hours of Service if 750 "Regular Time Hours" are worked. The parties dispute whether Gilley would be entitled to a pension under either or both of the two equivalencies the district court adopted. The math involved with both equivalencies is dense, enough so that during oral argument counsel had difficulty answering some of our questions about the numbers and formulas used during the trial.

The more fundamental point that Monsanto stressed, however, is that the Plan never included either of the two equivalencies that the district court used at Gilley's urging. Instead, the 1981 Plan included the 95-Hour Rule, another equivalency permitted by ERISA. *See* 29 C.F.R. § 2530.200b-3(e)(1)(iii). We will spare the reader the details of how the 95-Hour Rule plays out in Gilley's circumstances, except to say that everyone agrees that under it Gilley would not be entitled to a pension.

In its findings of fact and conclusions of law, the district court refused to apply the 95-Hour Rule set out in the 1981 Plan. Its reasoning was that "later amendments to the Plan should not have an effect on the 1972 calculations if they impact adversely on plaintiff's entitlement." Even though the two equivalencies that were more favorable to Gilley had never been part of the Plan, the district court justified their use on the grounds that Monsanto had not kept adequate records of the hours Gilley worked in 1972. It said that Gilley was entitled to

the "benefit of the doubt" because Monsanto had failed to keep adequate records from that year. Applying the two equivalencies that Gilley preferred, the court determined that he did have the requisite Hours of Service to receive a full year of credit for 1972, giving him ten years of Vested Service which entitled him to a pension. Throughout its reasoning, the court applied a "heightened arbitrary and capricious" standard of deference, because it concluded that the Plan Committee had a conflict of interest in making benefit decisions.

The court's judgment ordered Monsanto to pay Gilley his past due pension benefits, "plus appropriate interest," and to pay additional retirement benefits as they accrue in the future. Monsanto filed a motion to alter or amend the district court's judgment, asserting multiple mathematical and legal errors in the application of the two equivalencies the district court used. After the court denied that motion, Monsanto filed this appeal.

II.

We initially had some doubt about our jurisdiction to decide this appeal because, while the district court ordered Monsanto to pay "appropriate interest" on the award of past benefits, it did not specify the rate of interest or the date from which the interest would be calculated. We were concerned that the judgment might not be final

under 28 U.S.C. § 1291 for purposes of appellate review.

The district court's failure to set an interest rate for calculating prejudgment interest might have been a problem for the purpose of our jurisdiction if the judgment had no injunctive aspects. *See SEC v. Carrillo*, 325 F.3d 1268, 1272–73 (11th Cir. 2003) (per curiam) (noting that "if the judgment amount, the prejudgment interest rate, or the date from which prejudgment interest accrues is unclear, the calculation of prejudgment interest is no longer a ministerial act and the court's order is not final"); *but see Moon v. Am. Home Assurance Co.*, 888 F.2d 86, 89–90 (11th Cir. 1989) (addressing the merits but remanding the case back to the district court for clarification on the questions of whether prejudgment interest was intended and the rate at which any such interest should be calculated). However, the judgment here does include injunctive relief, because it requires Monsanto to continue to pay pension benefits as they accrue in the future. Under 28 U.S.C. § 1292(a)(1), we have jurisdiction over orders granting injunctive relief. The district court's judgment here is injunctive enough in nature to give us jurisdiction over the appeal.

III.

On the merits, both sides agree that Gilley must have ten years of credit to be entitled to a pension, and they agree that he earned at least nine years of credit for his work at the plant from 1973 to 1982.

Their disagreement is about whether Gilley gets a full year of credit for 1972, his first year on the job, when he actually worked only four months for Monsanto. If Gilley is credited with a full year for working those four months, he gets a pension.

The district court's conclusion that Gilley should be treated as having worked a full year in 1972 was based on its belief that instead of the 95-Hour Rule in the 1981 Plan, the Hours Worked or Regular Time Hours equivalencies, which Gilley proposed, should be used. The parties disagree about whether Gilley is entitled to a pension even if those two equivalencies are used, but they do agree that he is not entitled to a pension under the 1981 Plan's 95-Hour Rule. The question that determines the issues we address in this appeal is whether the 95-Hour Rule is the equivalency that should be applied.

A.

The parties think that the answer to that question might depend on the standard of deference applicable to the Plan Committee's decision to deny Gilley pension benefits. Monsanto argues that the arbitrary and capricious standard applies, while Gilley thinks the district court was correct to apply a heightened arbitrary and capricious standard. Given the nature of the issue on which this case turns, we doubt that the standard of deference makes any difference. To the extent that it does, however, the proper standard is arbitrary and capricious.

ERISA does not explicitly establish the standard of review to be applied to a plan administrator's decision. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109, 109 S. Ct. 948, 953 (1989). Following the Supreme Court's direction, however, we have adopted three different standards to guide us: (1) *de novo* review applies where the plan administrator has been given no discretion in deciding claims; (2) arbitrary and capricious review applies where the plan administrator has discretion in deciding claims and does not suffer from a conflict of interest; and (3) heightened arbitrary and capricious review applies where the plan administrator has discretion but suffers from a conflict of interest. *HCA Health Servs. of Ga., Inc. v. Employers Health Ins. Co.*, 240 F.3d 982, 993 (11th Cir. 2001). For purposes of that third standard, a conflict of interest exists when a provider has to pay benefit claims out of its own assets, making it directly advantageous to the provider for the claims to be denied. These three standards have been broadly applied to both the administrator's interpretation of plan provisions as well as the administrator's decision to grant or deny benefits. *Williams v. Bellsouth Telecomms., Inc.*, 373 F.3d 1132, 1135 n.3 (11th Cir. 2004); *Paramore v. Delta Air Lines, Inc.*, 129 F.3d 1446, 1451 (11th Cir. 1997).

Our circuit law is clear that no conflict of interest exists where benefits are paid from a trust that is funded through periodic contributions so that the provider incurs no immediate expense as a result of paying benefits. *See Buckley v. Metro. Life*,

115 F.3d 936, 939–40 (11th Cir. 1997). Only when benefits are paid from a provider's assets, so that benefit decisions have a direct and immediate impact on the provider's profit margin, does the heightened standard come into play. *See Williams*, 373 F.3d at 1135.

In this case, the Plan gave the Plan Committee discretion to make benefits decisions. The record clearly establishes that benefits were paid out of a nonreversionary trust instead of from Monsanto's own assets. In *Buckley*, we specifically considered the standard of deference to be applied when benefits are paid out of a trust funded by periodic, non-reversionary contributions. 115 F.3d at 939. We held that where the company neither incurs a direct expense in paying benefits nor directly profits from denying or discontinuing benefits, there is no conflict of interest. *Id.* at 939–40. That holding has been reiterated in subsequent cases. *See, e.g., Turner v. Delta Family-Care Disability & Survivorship Plan*, 291 F.3d 1270, 1273 (11th Cir. 2002) (per curiam) (a non-reversionary, periodic trust "eradicates any alleged conflict of interest so that the arbitrary or capricious standard of review applies"). The fact that the company is responsible for replenishing the funds of the trust is not enough to create a conflict of interest. *Id.*

For these reasons, the district court erred in applying the heightened arbitrary and capricious standard. To the extent that a deference standard applies, the ordinary arbitrary and capricious standard is the one.

B.

The district court also erred in forcing on the Plan two equivalencies that the Plan had never adopted. The court based its substitution of the equivalencies, Gilley favored for the one in the Plan on its view that Monsanto had failed to keep adequate records of the hours Gilley worked in 1972. We have some doubts about whether a court generally can impose on a plan equivalencies that the plan did not choose simply because of the absence of adequate records.

We have no doubt, however, that a plan cannot be forced to use an equivalency that is different from the one the plan chose simply because it or the company did not keep adequate records for ERISA purposes before there was any ERISA. The year we are talking about is 1972, and ERISA was not enacted until September of 1974 (with an effective date, for our purposes, of January 1, 1976, *see* 29 U.S.C. § 1061(b)(2)). Only after the time for doing so had passed did the Plan and the company learn that it would be necessary to make and keep the records. Companies and pension plan managers are not required to be clairvoyant.

Instead, when it comes to pre-enactment years, ERISA requires only that plans do the best they can with the records they have, and it permits plans to choose an equivalency from those set out in the regulations. 29 C.F.R. § 2530.200b-3(b), (d), (e). This is how the relevant regulation reads:

> If accessible records are insufficient to make an approximation of the number of pre-effective date hours of service for a particular employee . . . the plan may make a reasonable estimate of the hours of service completed by such employee . . . . A plan may use any of the equivalencies permitted under this section, or the elapsed time method of crediting service . . . to determine hours of service completed . . . .

Id. § 2530.200b–3(b).

That is exactly what the Plan did in this case. It chose the 95-Hour Rule and applied the rule to the vagaries of Gilley's 1972 work history. As the regulation we have quoted shows, ERISA permitted it to do so. The statute and regulations leave the choice of equivalencies to plans, not to courts. The district court should not have overridden the Plan's choice and applied an equivalency that was not in the Plan. *See id.* § 2530.200b–3(c)(1) ("Any equivalency used by a plan must be set forth *in the document* under which the plan is maintained." (emphasis added)).

C.

In addition to substituting its own preferred equivalencies because of the lack of adequate records of Gilley's work hours in 1972, the district court also rejected the 95-Hour Rule because it was adopted after 1972. The record is unclear exactly

when the 95-Hour Rule was adopted, but it was sometime between 1979 and January 1, 1981. The district court thought the fact that the rule was not adopted until sometime during that period foreclosed its use because, in the court's words, "later amendments to the Plan should not have an effect on the 1972 calculations if they impact adversely on plaintiff's entitlement."

First, it is important to recognize that there is no way Gilley could have accumulated the requisite ten years of Vested Service, under any calculation method, by the time Monsanto adopted the 95-Hour rule. On January 1, 1981, Gilley could have accumulated, at most, nine years of Vested Service credit. Even if he is given a full year of credit for 1972, he would still only have acquired nine years by the beginning of 1981. All of Gilley's arguments that he earned ten years of Vested Service count hours he worked in 1981 after the Plan was amended to put the 95-Hour Rule in place. This fact is critical to our analysis of whether the adoption of the 95-Hour Rule and its application to Gilley violated ERISA.

Gilley takes the district court's determination that later amendments cannot adversely impact a plaintiff's entitlement and runs with it, casting it in terms of ERISA's "anti-cutback" rule. ERISA § 204(g), 29 U.S.C. § 1054(g)(1). One of the purposes of ERISA is to protect pension rights by ensuring "that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain

a vested benefit—he actually will receive it." *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375, 100 S. Ct. 1723, 1733 (1980). To further that purpose, the "anti-cutback" rule provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan." ERISA § 204(g), 29 U.S.C. § 1054(g)(1). By its own terms, what the rule forbids is cutbacks on "accrued benefits." There is a difference between "accrued benefits" and "vested benefits."

The Supreme Court has explained that benefit accrual is "the rate at which an employee earns benefits to put in his pension account," while benefit vesting refers to the point at which a participant's pension rights become nonforfeitable "by virtue of his having fulfilled age and length of service requirements." *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 749, 124 S. Ct. 2230, 2238 (2004). A participant is fully vested when he has a nonforfeitable right to his total accrued benefit. In other words, benefit accrual affects the size of the pension, while benefit vesting determines whether a pension will be paid at all. *See Stewart v. Nat'l Shopmen Pension Fund*, 730 F.2d 1552, 1561–62 (D.C. Cir. 1984)(noting that "'vesting' governs when an employee has a right to a pension; 'accrued benefit' is used in calculating the amount of the benefit to which the employee is entitled"); *Silvernail v. Ameritech Pension Plan*, 439 F.3d 355, 359 (7th Cir. 2006) ("Benefit accrual and vesting are related but different concepts. Vesting provisions do not affect the amount of the

accrued benefit, but rather govern whether all or a portion of the accrued benefit is nonforfeitable.'" (quoting *Hoover v. Cumberland, Md., Area Teamsters Pension Fund*, 756 F.2d 977, 983-84 (3d Cir. 1985))).

The Plan amendment adopting the 95-Hour Rule affected Gilley's ability to vest before he had vested, but it did not reduce the amount of his accrued benefit or the rate at which he was accruing benefits. Throughout Gilley's employment the Plan provided that an employee had to reach the retirement age and have accumulated the requisite ten years of Vested Service before he was entitled to a pension. The amendment adopting the 95-Hour Rule, which occurred during Gilley's employment, did not affect the rate at which he accrued benefits, although it did alter the method for calculating Vested Service, which in turn determined whether he received a pension. The ERISA § 204(g) anti-cutback provision does not apply to changes in vesting requirements.

There is another provision, however, that does. Section 203 of ERISA provides that a plan amendment changing the vesting schedule shall be treated as not satisfying the requirements of ERISA:

> if the nonforfeitable percentage of the accrued benefit derived from employer contributions (determined as of the later of the date such amendment is adopted, or the date such amendment

> becomes effective) of any employee who is a participant in the plan is less than such nonforfeitable percentage computed under the plan without regard to such amendment, unless the employee is given the option of electing the pre-amendment plan.

ERISA § 203(4)(c)(1)(A); 29 U.S.C. § 1053(4)(c)(1)(A). Although Monsanto argues that the amendment introducing the 95-Hour Rule did not change the vesting schedule, some courts have concluded that changes in the way vesting is determined can amount to an alteration of the vesting schedule. *See, e.g., Fentron Indus., Inc. v. Nat'l Shopmen Pension Fund,* 674 F.2d 1300, 1306 (9th Cir. 1982) (noting that the cancellation of past service credits, which diminished the pension credits of otherwise vested participants, was a vesting schedule amendment). We will assume for present purposes that those courts are correct and that the Plan amendment we are discussing did change the Plan's vesting schedule.

Even making that assumption, there still was no violation of ERISA § 203, because the plain language of the provision limits its scope to benefits that are nonforfeitable ("if the nonforfeitable percentage . . . such nonforfeitable percentage") at the time the amendment is adopted or becomes effective ("determined as of the later of the date such amendment is adopted, or the date such amendment becomes effective"). ERISA § 203(4)(c)(1)(A); 29 U.S.C. § 1053(4)(c)(1)(A). When

the 95-Hour Rule amendment became effective on or before January 1, 1981, and when it was adopted sometime on or before that date, Gilley was not entitled to any benefits, because he could not have earned ten years of Vested Service until after that date. Because Gilley was not vested at the time the amendment was adopted or became effective, ERISA § 203 does not help him. It follows that the district court erred in concluding that the Plan amendment adopting the 95-Hour Rule could not be applied to Gilley because it came after he had started earning credit toward his pension.

D.

To the district court's reasons for not allowing the 95-Hour Rule, Gilley adds some more of his own. Among them is his assertion that he was never properly notified of the amendment. We decline to consider that contention because it was raised for the first time in this appeal. *FDIC v. Verex Assurance, Inc.*, 3 F.3d 391, 395 (11th Cir. 1993) ("By well settled convention, appellate courts generally will not consider an issue or theory that was not raised in the district court."). Gilley also appears to argue that the amendment discriminates against him, an argument which is difficult to follow and unpersuasive in any event.

Finally, Gilley raises a host of arguments, both before us now and in earlier proceedings, about why he is equitably entitled to a pension notwithstanding his inability to satisfy the vesting requirements under the 95-Hour Rule. The district

court did not reach any of these arguments and we decline to take the first swing at them. Some may require factual development, while all of them may benefit from two-tier consideration. All of them the district court should deal with as it deems appropriate on remand.

IV.

The judgment of the district court is **VACATED** and the case is **REMANDED** for further proceedings consistent with this opinion.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

No. 04-0562

[Filed March 3, 2006]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff(s)	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation	)
Defendants.	)

BEFORE: Robert B. Propst, SENIOR UNITED STATES DISTRICT JUDGE

ORDER

This cause comes on to be heard on the Defendants' Motion to Amend Judgment of January 26, 2006 filed on February 8, 2006.

The court's intention is to base its partial final judgment solely on a finding and conclusion that the plaintiff is entitled, for reasons stated, to be credited with 1000 hours of service for 1972. Any other claim not previously dismissed will still be pending.

Any issues with regard to the effect of the judgment on other claims can be resolved by further motion practice.

A significant issue with regard to the partial final judgment may be whether the following statement of the defendants, if correct in some instances, has application to a defendant with a conflict of interest. "Although federal regulations recognize a permitted equivalency that uses 870 Hours of Service as the threshold, the regulation is clear that it is for the Plan, and not individual participants, to elect the equivalency of its choice. *See* C.F.R. § 2530 200b-3(a)."

The motion is **DENIED**.[1]

DONE and **ORDERED** this the 3rd day of March, 2006.

/s/ ROBERT B. PROPST

SENIOR UNITED STATES DISTRICT JUDGE

[1]The court recognizes that ERISA was not in effect in 1972. The court's reference to "benefit of the doubt" was not intended as an exact legal standard, but merely to suggest that the defendants were not able to rebut the plaintiff's evidence because it did not retain payroll records.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

No. 04-0562

[Filed January 31, 2006]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff(s)	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation	)
Defendants	)

BEFORE: Robert B. Propst, SENIOR UNITED STATES DISTRICT JUDGE

ORDER

This cause comes on to be heard on Plaintiff's Motion to Alter or Amend the Judgment filed on January 30, 2006. The court's judgments were entered pursuant to Rule 54(b). The court did not "dismiss" any other claims. To the extent that the Clerk has made a docket entry suggesting a dismissal of the "case," that entry shall be corrected.[1]

DONE and **ORDERED** this the 31st day of January, 2006.

/s/ ROBERT B. PROPST

SENIOR UNITED STATES DISTRICT JUDGE

[1]There is no need to "alter or amend" the Judgment.

BEFORE: Robert B. Propst, SENIOR UNITED STATES DISTRICT JUDGE

ORDER

Any motions with regard to the remaining claims in this cause must be filed within 30 days. The court's courtroom deputy will set a pretrial conference within 60-90 days thereafter.

DONE and **ORDERED** this the 31st day of January, 2006.

/s/ ROBERT B. PROPST

SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

No. 04-0562

[Filed January 26, 2006]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff(s)	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation	)
Defendants.	)

BEFORE: Robert B. Propst, SENIOR UNITED STATES DISTRICT JUDGE

ORDER

In accordance with Findings of Fact and Conclusions of Law filed contemporaneously herewith, judgment is entered in favor of the plaintiff. The court adjudges and declares that the plaintiff is entitled to retirement benefits as provided in the defendants' ERISA Plan. The defendants will pay accrued benefits on past due payments plus appropriate interest and continue to pay retirement benefits as they accrue. The court expressly determines that there is no just reason for delay and expressly directs the entry of a final judgment as stated above. Costs are assessed against the defendants. The parties may file suggested amendments to this judgment within ten (10) days.

DONE and **ORDERED** this the **26th** day of January, 2006.

/s/ ROBERT B. ROPST

SENIOR UNITED STATES DISTRICT JUDGE

BEFORE: Robert B. Propst, SENIOR UNITED STATES DISTRICT JUDGE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on to be heard at trial on the limited issue of whether plaintiff's entitlement to retirement benefits vested before his employment was terminated. In essence the present issue is whether the plaintiff should be credited with 1000 or more hours of vesting service for the year 1972. This court has framed the issues and arguments in its Memorandum Opinion filed on May 3 1, 2005, and will not repeat those issues and arguments here.[1]

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[1]Since the May 31, 2005 opinion dealt with a motion for summary judgment, it is not entirely relevant to the trial herein addressed. The limited issues of this trial are, however, framed and discussed in that opinion, and, to the extent applicable are adopted here. Some issues addressed in the May 31, 2005 opinion were not tried in the trial now being addressed. See various filings of the parties for further argument and development. While it is doubtful, the respective proposed findings of fact and conclusions of law of the parties may contain some areas of agreement. To the extent they do, they are adopted. The court proposed addressing questions to IRS and/or the Department of Labor. Both sides objected, so the court decided to forego this proposal. The plaintiff's service began on August 30, 1972. Defendant has acknowledged that if that service had begun in late July 1972, plaintiff's retirement benefits would have vested.

While the court has been inundated with verbiage, the task is to determine whether the plaintiff should receive credit for 1000 hours of vesting service for 1972. The issue is close from any perspective.[2]

The court finds and concludes that the defendants' denial of plaintiff's retirement benefits is to be reviewed under a "heightened arbitrary and capricious" standard because of a conflict of interest.

The court further finds and concludes that the defendants' conclusion that plaintiff was not entitled to have overtime considered was arbitrary and capricious and not due to be herein considered. Further, the 95 hour rule is not applicable to a 1972 calculation. In general, later amendments to the Plan should not have an effect on the 1972 calculations if they impact adversely on plaintiff's entitlement.

The court's task is to determine how many hours the plaintiff is entitled to for 1972. Since the defendant does not have adequate records of the plaintiffs overtime hours, the plaintiff should be given some benefit of the doubt in this regard.

---

[2]If plaintiff's testimony that he worked as many overtime hours as regular hours in 1972 is accepted, he would be entitled to 1000 hours of service time. The court has no substantial basis for discrediting this testimony. *See attached* Exhibit A filed by the plaintiff on December 19, 2005.

The plaintiff makes two arguments that this court cannot accept. The first is that overtime hours should be counted as one and one-half hours because the plaintiff would have been paid based on one and one-half hours. The court finds no basis for such a calculation of service time. Second, plaintiff argues that the hours that plaintiff accrued for vacation time, sick pay time, etc. are to be counted at the time accrued rather that at the time taken. The court cannot accept this argument. Without the validity of such arguments, it is questionable as to whether the plaintiff had 1000 actual hours of service in 1972. On the other hand, the defendants' failure to keep adequate records leads to another theory of recovery. 29 C.F.R. § 2530.200b-3(a) states:

> Payroll records, for example, may provide sufficiently accurate data to serve as a basis for determining hours of service. If, however, existing records do not accurately reflect the actual number of hours of service with which an employee is entitled to be credited, a plan must either develop and maintain adequate records or use one of the permitted equivalencies.

. . . .

29 C.F.R. § 2530.200b-3(c) states:

Use of equivalencies for determining service to be credited to employees.

(1) The equivalencies permitted under paragraphs (d), (c) and (f) of this section are methods of determining service to be credited to employees during computation periods which are alternatives to the general rule for determining hours of service set forth in paragraph (a) of this section. The equivalencies are designed to enable a plan to determine the amount of service to be credited to an employee in a computation period on the basis of records which do not accurately reflect the actual number of hours of service required to be credited to the employee under § 2530.200b-2(a). However, the equivalencies may be used even if such records are maintained. Any equivalency used by a plan must set forth in the document under which the plan is maintained.

. . . .

29 C.F.R. § 2530.200b-3(d) states:

Equivalencies based on working time. (1) Hours worked. A plan may determine service to be credited to an employee on the basis of hours worked, as defined in paragraph (d)(3)(1) of this section, if 870 hours worked are treated as equivalent to 1,000 hours of service and 435 hours

> worked are treated as equivalent to 500 hours of service.
>
> (2) Regular time hours. A plan may determine service to be credited to an employee on the basis of regular time hours, as defined in paragraph (d)(3)(ii) of this section, if 750 regular time hours are treated as equivalent to 1,000 hours of service and 375 regular time hours are treated as equivalent to 500 hours of service.

Other parts of 29 C.F.R. § 2530.200b-3 may have application.

The plaintiff makes two arguments of "equivalency" by his attached Exhibits B and C filed by him on December 19, 2005. The court finds and concludes that the plaintiff clearly had at least 870 hours of service (sic) for 1972. On this theory, which the court accepts, the plaintiff's entitlement to benefits vested prior to this termination. Judgment will be entered in favor of the plaintiff.

This the 26th day of January, 2006. (Exhibits Omitted)

/s/ ROBERT B. PROPST

SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

No. 04-0562

[Filed January 26, 2006]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff(s)	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation	)
Defendants.	)

BEFORE: Robert B. Propst, SENIOR UNITED STATES DISTRICT JUDGE

MEMORANDUM OPINION

This cause comes on to be heard on the plaintiff's Motion for Reconsideration of Class Certification filed on December 5, 2005. The court has discussed the reasons for the denial of the earlier motion. The most recent motion does not suggest any reasonable basis for reconsideration. The most recent motion merely adds emphasis to the lack of the numerosity element.[1] The fact that the court has struggled with plaintiff's individual claim further indicates the fact intensive nature of any individual claims. The individual nature of any claims and the difficulty of analyzing them also indicates the lack of manageability. The motion will be denied. For comparison, *see Cooper v. Southern Company*, 390 F.3d 695 (11 th Cir. 2004); particularly see Headnote Keys 19-21.

/s/ ROBERT B. PROPST

SENIOR UNITED STATES DISTRICT JUDGE

[1]Numerosity, commonality and typicality are all belied by the fact that this case depends on whether someone began work at the Sand Mountain plant in July or August or later or earlier in 1971 (sic). Note the minimal number of persons named in the subject motion.

BEFORE: Robert B. Propst, SENIOR UNITED STATES DISTRICT JUDGE

ORDER

In accordance with a Memorandum Opinion filed contemporaneously herewith, plaintiff's Motion for Reconsideration of Class Certification filed on December 5, 2005, is **DENIED**. The court expressly determines that there is no just reason for delay with regard to the order of the court filed March 4, 2005 which denied class certification nor as to this order denying reconsideration thereof and expressly directs the entry of final judgment as to each of said orders.

DONE and **ORDERED** this the 26th day of January, 2006.

/s/ ROBERT B. PROPST

SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

No. 04-0562
[Filed October 13, 2005]
[Hearing Held August 1, 2005]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff(s)	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation	)
Defendants.	)

BEFORE: Robert B. Propst, SENIOR UNITED STATES DISTRICT JUDGE

EXCERPTS

* * *

APPEARANCES:
FOR THE PLAINTIFF:
ELISA S. RIVES
Attorney at Law
103 Ringold Plaza
Guntersville, AL 35976

FOR THE DEFENDANT:
JEFFREY SCOTT RUSSELL
Bryan Cave LLP
St Louis, MO 63102

DONALD R. JAMES
Baxley Dillard Dauphin
McKnight
Birmingham, AL 35205

THE COURT: Now, let me start and try to see if I can pierce through this veil as much as I possibly can. All right. Plaintiff, one of your positions is that in the year, 1972, is that the first year?

MS. RIVES: Yes, sir.

THE COURT: And, please, all of you answer my questions as directly as you can. One of your positions is that in 1972 that Mr. Gilley worked

1,000 hours and that thereby that made him eligible for 10 year vesting; is that correct or not?

MS. RIVES: No. It's not correct. My client doesn't have to work 1,000 hours –

THE COURT: No. Do you mean to tell me that you have never taken the position –

MS. RIVES: No, Your Honor.

THE COURT: -- that he worked enough overtime in 1972 to get in 1,000 hours which made him eligible?

MS. RIVES: No. He doesn't have to work 1,000 hours. He has to have 1,000 hours of Credited Service. Credited Service includes overtime, hours worked, vacation time, and compensation time...

THE COURT: Okay. Well –

MS. RIVES: Not 1,000 hours work time. That's their position.

THE COURT: Okay. Let me back up then. One of your positions is that he got 1,000 hours credit in 1972, and that that made him eligible for vesting; is that correct?

MS. RIVES: Yes, Your Honor. That's one of my positions. THE COURT: That's the only one we're here to try today.

MS. RIVES: Yes, Your Honor. But not because it made him eligible under the current plan, but because they violated the ERISA mandates for discrimination and by adding the 95-Hour Rule while Mr. Gilley and other individuals were out on layoff, and they amended the plan and they applied the amendment backwards. Otherwise, there's no claim. The defendants' position has been consistently that this is just a claim for benefits, a claim for benefits, a claim for benefits. This is not an action about a claim for benefits. This is an action about the violation of ERISA Section 204 –

THE COURT: Well, wait a minute. A violation of ERISA, that's a claim for benefits, also, isn't it? If you're claiming benefits, you're claiming a violation of ERISA, aren't you?

MS. RIVES: Yes and no. You can have a claim for benefits strictly under the terms of the Plan or you can have a claim --

THE COURT: And that's not an ERISA claim?

MS. RIVES: Your Honor, there's a Section 502(a)(B)(1), or there's a Section 502 (a)(3). This is a claim under 502(a)(3). This is a claim for equitable relief because they violated ERISA by applying an amendment backwards. I believe also that there are --

THE COURT: Are you not making a claim that he vested, by virtue of having 10 years of vesting time, and therefore he thus becomes entitled to benefits?

MS. RIVES: I'm making a claim that he's entitled to equitable relief, not that he's entitled to just benefits, but equitable relief, that inevitably they will get him his benefits. But until you get to that position, you have to find that the 95-Hour Rule could not be applied backwards. That's a separate claim. Plaintiffs get pigeonholed with this constant you're applying for just benefits, just benefits. It's not about just benefits. It's a claim for discrimination under Section 510 --

THE COURT: Discrimination as related to whom?

MS. RIVES: As related to Mr. Gilley as a technical clerical employee who is the only type of individual they applied this 95-Hour Rule to.

THE COURT: Refresh my memory as to what the 95-Hour Rule is.

MS. RIVES: The 95-Hour Rule was an amendment they added to the Plan. The first time I can identify defendants taking the opposite position, the first time that I can find it in a document in regards to the Summary Plan document –

THE COURT: Slow down a little bit, if you will.

MS. RIVES: Yes, sir. Was in 1981. What the amendment says is that the employer can elect to award 95 hours of Credited Service every semi-monthly pay period regardless of how many hours you worked. That rule in and of itself, if applied forward or backwards is somewhat –

THE COURT: Let me ask you this: Regardless of the application of the 95-Hour Rule, unless it's applied to the year 1972, does it have any effect on your client?

MS. RIVES: I'm sorry? I don't understand the question. You're saying regardless of –

THE COURT: It's my understanding, and I feel like I'm working in a foreign language in talking to both of you, but be that as it may, it's my understanding that there is no real dispute that if, except for the year 1972, and the argument that you all are respectively making with regard to the year 1972, that there is no dispute that he had a full year of '73, '74, '75, '76, '77, '78, '79, '80, '81, and I think '82, whatever gets us up to '90; right?

MS. RIVES: Actually, in 1982, the defendants take the position that Mr. Gilley chose termination in February of 1982, from layoff. The plaintiff's position is that he did not choose termination, that he was simply terminated --whatever paperwork they chose to do, not giving him a full year of credit up until March 31st, 1982.

THE COURT: Let me see if I can get some semblance of understanding of even what the positions are. Do I not understand that if he became eligible for a full year's credit in 1972, that there is no other issue? If he got credit for a full year's service in 1972, then everything else is insignificant as far as his individual claim is concerned; isn't that correct?

MS. RIVES: As far as his individual -- no, Your Honor. They breached their duty to keep the records that they were under an obligation, under the law, to keep. They discriminated against my client as an individual.

THE COURT: And that gets him what?

MS. RIVES: The same thing. At the same time, I'm not going to stand here and say, well, it's just a claim for benefits. That's their position. My position is that –

THE COURT: Well, I want to know -- I assume that that gentleman can't spend principle, spelled P-L-E. He can spend principal spelled P-A-L; but he can't spend principle spelled P-L-E. If he gets his pension and gets his backpay and everything under his pension, what else can he get?

MS. RIVES: That's all he can get as far as monetary relief or equitable relief in regards to his individual claims. But he sits here as a Plan participant suing on behalf of the Plan; and the Plan can get something in regards to him. Also, I filed this as a class action and –

THE COURT: Well, wait a minute. Now, let's get down to the class action. I was looking back through the file awhile ago. You at some point filed an opposition to the defendants' motion for an extension of time for the plaintiff's motion for class certification. Then you filed a motion for class certification. We held a hearing and talked about it

on the phone. I specifically asked you, do you want me to give you additional time for discovery on this class action or do you want me to go ahead and decide it? You told me you wanted me to go ahead and decide it. At that time, you had not named one person that would fall into the category of determining numerosity; is that correct or not?

MS. RIVES: That's not correct, Your Honor.

THE COURT: What's incorrect about anything I just said?

MS. RIVES: What's incorrect about it is, what you said on the telephone was -- I said, Your Honor, there is a motion to compel outstanding. And you said, well, I passed that off to Judge Davis and can't I do that? And I said, yes, sir, you can. And you said, well, I'll look into that; and if we need to look at a motion to compel -- and after I look at the motion to compel, if that's needed, then we will reopen discovery in regards to whatever we need to do. Based on that language from you, I assumed that you were going to at least allow a look into the motion to compel which had many, many, many –

THE COURT: You did not tell me that you wanted me to go ahead and determine the class certification? The record will speak for whatever it said.

MS. RIVES: Yes, Your Honor, it will speak for whatever it says. You said you were going to look

into the motion to compel and you would come back -- look at the motion to compel --

THE COURT: Well, you filed a motion for class certification. You did not think at the time that you had whatever it took to obtain a class certification?

MS. RIVES: Your Honor, I filed a motion to compel in November. The deadline –

THE COURT: No. I mean you filed a motion for class certification, did you not?

MS. RIVES: Yes, sir, I did.

THE COURT: And it came under submission, did it not?

MS. RIVES: Yes, sir, it did. And you ruled on it without allowing the motion to compel to be ruled on beforehand. In fact, the motion to compel was not heard until a week after discovery closed. Discovery closed on April 1st. I believe April 1st.

THE COURT: Did he ever rule on the motion to compel?

MS. RIVES: A week after discovery was closed.

THE COURT: What did he rule?

MS. RIVES: In regards to the class action, because you had already ruled that there was no class action, he said that he was not going to rule on that

because the defendants presented to the Court that that was a dead issue.

THE COURT: Whatever. Okay. The issue we're here to try today is, as I understand it, and correct me if I'm wrong. First of all, you all have filed a motion for me to strike exhibits related to the Plan and things of that type. Now, when somebody is seeking recovery under an ERISA Plan and has exhausted administrative remedies, they don't have to tell you all what the plan is, do they?

MR. RUSSELL: No, Your Honor.

THE COURT: A lot of that you all put in your motion, that's just something you should have known and had with you.

MR. RUSSELL: With regard to the Plan documents, that's exactly right, Your Honor.

THE COURT: But you've asked me to exclude them, didn't you?

MR. RUSSELL: We asked you to exclude anything that was beyond the administrative record, if we referred to –

THE COURT: Including the Plan document?

MR. RUSSELL: That would have been a mistake, Your Honor.

THE COURT: That was what?

MR. RUSSELL: That would have been a mistake for us to ask you to exclude those and you properly denied the motion as to those.

THE COURT: That's what I'm wondering is when is it a mistake and when is it substance?

MR. RUSSELL: Right. And your ruling with regard to bringing in the Plan documents is correct, Your Honor, and –

THE COURT: Thank you.

MR. RUSSELL: You don't need me to tell you that. There are other materials, like Mr. Gilley's live testimony, for example, that is not part of the administrative record. He never appeared in front of the Committee. Those are the things that ought to be excluded and that's what our motion is based on.

THE COURT: Well, my understanding is, at least part of what we're here to establish is how much time that he either worked or was on vacation, or however you say it added up. Do you agree that if he somehow or another got 1,000 hours in 1972, calculated however it's due to be calculated, that he would be eligible?

MR. RUSSELL: That's correct, Your Honor.

THE COURT: You agree to that?

MR. RUSSELL: Yes, we do, Your Honor.

THE COURT: Okay. So now you go ahead and prove, however you expect to prove, that he should get 1,000 hours for 1972.

* * *

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

No. 04-0562

[Filed June 16, 2005]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff(s)	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation	)
Defendants.	)

BEFORE: Robert B. Propst, SENIOR UNITED STATES DISTRICT JUDGE

ORDER

This cause comes on to be heard on the Defendants' Motion for Scheduling Conference and to Clarify Issues for Trial filed by defendants on June 15, 2005. As earlier stated, the initial hearing will be for the court to determine the pertinent overtime which the plaintiff worked and whether, based upon that evidence, the plaintiff can prevail. If the court does not so determine, other issues can be set for later hearings.

DONE and **ORDERED** this 16th day of June, 2005.

/s/ ROBERT B. PROPST

SENIOR UNITED STATES DISTRICT JUDGE

BEFORE: Robert B. Propst, SENIOR UNITED STATES DISTRICT JUDGE

ORDER

At the first hearing, the court will also receive evidence relating to the various plans, the ambiguity thereof, the terms thereof, etc. The court will not receive evidence as to what participants may have been orally told. That issue can be addressed by subsequent hearing if necessary.

DONE and **ORDERED** this 16th day of June, 2005.

/s/ ROBERT B. PROPST

SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX L

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

No. 04-0562

[Filed March 4, 2005]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff(s)	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation	)
Defendants.	)

BEFORE: Robert B. Propst, SENIOR UNITED STATES DISTRICT JUDGE

MEMORANDUM OPINION

EXCERPTS

This cause comes on to be heard upon plaintiff Wendell F. Gilley's Motion for Class Certification, filed on December 10, 2004.

* * *

CONCLUSIONS OF THE COURT

The court turns to *Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir. 2004) for guidance and notes the following statements therein:

> The plaintiffs rely on the Supreme Court's often-cited admonition in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), that "nothing in either the language or history of Rule 23 ... gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.* at 177, 94 S.Ct. at 2152. However, we have noted that "[w]hile it is true that a trial court may not properly reach the merits of a claim when determining whether class

> certification is warranted, this principle should not be talismanically invoked to artificially limit a trial court's examination of the factors necessary to a reasoned determination of whether a plaintiff has met her burden of establishing each of the Rule 23 class action requirements." *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir.1984) (citation omitted).
>
> Indeed, both the Supreme Court and this Court have noted since *Eisen* that evidence pertaining to the requirements embodied in Rule 23 is often intertwined with the merits, making it impossible to meaningfully address the Rule 23 criteria without at least touching on the "merits" of the litigation. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n. 12, 98 S.Ct. 2454, 2458 n. 12, 57 L.Ed.2d 351 (1978) ("Evaluation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims." (citation omitted)); *Nelson v. U.S. Steel Corp.*, 709 F.2d 675, 679 (11th Cir.1983) (explaining that Rule 23(a) evidence "is often intertwined with the merits").

390 F.3d at 712.

The typicality and commonality requirements are distinct but interrelated, as the Supreme Court has made clear:

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. *Falcon*, 457 U.S. at 157 n. 13, 102 S.Ct. at 2370 n. 13. We have similarly explained that "the commonality and typicality requirements of Rule 23(a) overlap. Both requirements focus on whether a sufficient nexus exists between the legal claims of the named class representatives and those of individual class members to warrant class certification." *Prado-Steiman*, 221 F.3d at 1278.

Id. at 713.

> In addition, the plaintiffs sought to represent a very broad class that purported to represent all African-American employees of the defendants, at all levels of the corporate hierarchy of all the defendant companies. Because the plaintiffs asserted broad claims on behalf of a broad class, they were required to identify representative plaintiffs who shared those broad claims.

Id. at 715.

> In the first place, the district court noted that Madden's reports did not incorporate variables that would allow for the comparison of individuals who were similarly situated with respect to managerial decision makers, job types, locations, departments, and the specific criteria relevant for the jobs in question. Madden did not tailor her analysis to the specific positions, job locations, or departmental and organizational structures in question; however, the wide-ranging and highly diversified nature of the defendants' operations requires that employee comparisons take these distinctions into account in order to ensure that the black and white employees being

compared are similarly situated. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57, 109 S.Ct. 2115, 2124-25, 104 L.Ed.2d 733 (1989) ("[A] Title VII plaintiff does not make a case of disparate impact simply by showing that, 'at the bottom line,' there is racial imbalance in the work force."); *see also Brown v. Am. Honda Motor Co.*, 939 F.2d 946, 952 (11th Cir.1991) ("Statistics ... without a [proper] analytic foundation[ ] are virtually meaningless."); *Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.*, 328 F.3d 309, 319 (7th Cir.2003) ("The Supreme Court has emphasized the 65 importance of looking to the proper base 'group' when making statistical comparisons and examining all of the surrounding facts and circumstances which create the statistics themselves.").

Id. at 717.

Moreover, determining the level of damages to which each class member was entitled plainly would require detailed, case-by-case fact finding, carefully calibrated for each individual employee. The "complex, individualized determinations" necessary to fix the appropriate level

> of individual damage awards in this case are exactly the type that Murray and Allison make clear should not be considered "incidental" to the claims for injunctive and declaratory relief.

Id. at 721 (footnote omitted).

> Therefore, "the issues in the class action that are subject to generalized proof and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof." *Kerr v. City of W. Palm Beach*, 875 F.2d 1546, 1558 (11th Cir.1989) (citation and internal quotation marks omitted). Common issues will not predominate over individual questions if, "as a practical matter, the resolution of ... [an] overarching common issue breaks down into an unmanageable variety of individual legal and factual issues." *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1023 (11th Cir.1996).

Id. at 722.

The court concludes that this case does not lend itself to class certification. Plaintiff has not identified a single employee similarly situated to the plaintiff; much less a sufficient number for

numerosity. Among the variables which may be applicable to individuals are (1) the number of overtime hours worked; (2) whether employees accepted transfers and their pensions thereafter vested; (3) what representations were made and by whom; (4) dates of service; (5) overall hours worked, etc.

Whether viewed with regard to problems of manageability, numerosity, typicality or commonality, the plaintiff has not met his burden of establishing that the case is appropriate for class certification. The Motion for Class Certification filed on December 10, 2004 will be denied.

This 4th of March, 2005.

/s/ ROBERT B. PROPST

SENIOR UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
OCT 17 2009
OFFICE OF THE CLERK

No. 08-1511

IN THE SUPREME COURT OF THE UNITED STATES

WENDELL F. GILLEY, an individual
and as class representative,
Petitioner(s)

v.

MONSANTO COMPANY, INC. et al.
Respondent(s)

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR REHEARING

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OCTOBER 16, 2009

QUESTION PRESENTED ON WRIT OF CERTIORARI

1. Whether after *Metropolitan Life Insurance Co. v. Glenn*, 554 U.S. __, 128 S.Ct. 2343 (2008) a non-reversionary trust vitiates the need for consideration of an ERISA plan's conflict of interest as a factor?

RULE 14.1(b) STATEMENT

Respondents: "New" Monsanto Company, Inc., Monsanto Company Salaried Employees' Pension Plan, Monsanto Company Employee Benefits Plan Committee, Monsanto Company Employee Benefits Executive Committee, and Pharmacia Corporation.

Petitioner: Wendell F. Gilley, an individual.

RULE 29.6 STATEMENT

New Monsanto Company, Inc., a successor entity of "Old" Monsanto Company, Inc.

Pharmacia Corporation, a successor entity of "Old" Monsanto Company, Inc., a subsidiary of Pfizer, Inc.

Solutia Inc., a successor entity of "Old" Monsanto Company, Inc.[1]

---

[1]Pharmacia f/k/a "Old" Monsanto Company, Inc. is the original obligor for pensions belonging to former workers who separated with a deferred vested accrued benefit, a pension. Solutia as assignee filed for bankruptcy protection in the Southern District of New York prior to the initiation of the instant litigation. *In re: Solutia Inc. et al.* Case No. 03-17949 (PCB). Solutia's interests in the instant proceedings were represented by counsel for Respondents who filed proof of claims in Solutia's bankruptcy proceeding.

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Central Laborers' Pension Fund v. Heinz,
541 U.S. 739 (2004).....7

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524 U.S. 498 (1998).....8

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482 U.S. 1 (1987).....4

Gilley v. Monsanto Company, Inc.,
490 F.3d 848 (11th Cir. 2007).....*passim*

Gilley v. Monsanto Company, Inc.,
309 Fed. Appx. 362 (11th Cir. 2009).....*passim*

Harris v. Amgen, Inc. et al.,
573 F.3d 728 (9th Cir. July 14, 2009).....5

Heptinstall et al. v. Monsanto Co., Inc. et al.
Appeal No. 9-12665-DD pending Eleventh Circuit .....*passim*

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IN THE SUPREME COURT OF THE UNITED STATES

WENDELL F. GILLEY, an individual
and as class representative,
Petitioner(s)

v.

MONSANTO COMPANY, INC. et al.
Respondent(s)

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR REHEARING

CONSTITUTIONAL PROVISIONS

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridge the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. CONST. amend I.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. CONST. amend V.

FEDERAL STATUTE

As part of a comprehensive enforcement scheme the Employee Retirement Income Security Act ("ERISA") 29 U.S.C. § 1000 et seq., permits:

> (a) A civil action [to be] be brought – (2) . . . by a participant . . . for appropriate relief under section 409; (3) by a participant . . . (A) to enjoin any act or practice which violates any provision of this title . . . or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the plan. 29 U.S.C. §§ 1132(a)(2) & (3).

STATEMENT

After due consideration, counsels for Petitioner, Wendell F. Gilley, as an individual and class representative for former workers of "Old" Monsanto Company, Inc., believe that a Petition for Rehearing is appropriate in this case. Petitioner presents his Petition in good faith and not for any purpose of delay. There can be no prejudice to Respondents as the underlying relief sought by Petitioner is for equitable relief. Petitioner hereby prays for reconsideration of the denial on October 5, 2009, of his Writ of Certiorari.

FACTS AND PRIOR PROCEEDINGS

Petitioner, Wendell F. Gilley, hereby incorporates by reference the statement of facts and prior proceedings set forth in his Petition for Writ of Certiorari No. 07-0643 filed November 8, 2007, and his Petition for Writ of Certiorari No. 08-1511 filed June 2, 2009, and denied on October 5, 2009.

Petitioner, individually and on behalf of a class, sought equitable relief under 29 U.S.C. § 1132(a)(2) and (3) in the Northern District of Alabama Middle Division, Case No. 04-CV-0562 for breach of fiduciary duty

Respondents refusing discovery and resisting certification, primarily on numerosity grounds, recast the class action as an individual discretionary claim for benefits under 29 U.S.C. § 1132(a)(1)(B). Based on a finding of a conflict of interest the District Court awarded Petitioner his accrued benefit as equitable relief applying a heightened standard of review. Appendix A & B. On June 28, 2007, the United States Court of Appeals for the Eleventh Circuit issued a precedential decision reversing the District Court's award of Petitioner's accrued benefit as equitable relief under 29 U.S.C. § 1132(a)(3) finding the relief requested was legal relief only available under 29 U.S.C. § 1132(a)(1)(B).[1] A copy of the published precedential opinion is attached at Appendix C. Petitioner filed a Petition for Writ of Certiorari in this Court for review of the interlocutory decision, Case No. 07-0643, that was denied on January 14, 2008. As this Court has said many times "[s]uch an order is plainly not a "judgment or decision . . . on the merits." *Boumediene v. Bush*, 550 U.S. ____ (2007).

On remanded to the District Court Petitioner's remaining claims for equitable relief were dismissed *sua sponte* for lack of subject matter jurisdiction based on the law of the case doctrine. Appendix D. Petitioner appealed and the Eleventh Circuit affirmed finding the law of the case

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[1]Because Respondents stipulated that Petitioner was vested under "Old" Monsanto's defined benefit plan the only issue on interlocutory appeal was whether a former employee was entitled to bring a claim for benefits as equitable relief if he did not receive all he was entitled to receive as a result of a breach of fiduciary duty.

established in *Gilley v. Monsanto Company, Inc.*, 490 F.3d 848 (11th Cir. 2007) controlled, and there were no meritorious exceptions. A copy of the Eleventh Circuit's unpublished decision is attached at Appendix E. A Petition for *En Banc* review was denied on April 6, 2009. Appendix F. A motion of Appellant, Wendell F. Gilley, for stay of the issuance of the mandate pending Petition for Writ of Certiorari was denied April 28, 2009. Appendix G. This Court denied Petitioner's second Petition for Writ of Certiorari on October 5, 2009.

INTERVENING CIRCUMSTANCES

In the instant action, a divided panel of the Eleventh Circuit in a precedential decision declared Petitioner was not entitled to benefits as equitable relief to redress a breach of fiduciary duty. *Gilley v. Monsanto Company, Inc., 490 F.3d 848* (11th Cir. 2007); *Gilley v. Monsanto Company, Inc.*, 309 Fed. Appx. 362 (11th Cir. 2009). Respondents utilizing the uniform common law doctrine and this case as precedent seek in a case below *Heptinstall v. Monsanto Company, Inc.* 09-12665-DD to deny equitable relief to all former workers of "Old" Monsanto who separated with a right to an accrued vested pension benefit. *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 9 (1987).

Since the filing of Petitioner's Writ of Certiorari a circuit split has arisen on the issue of allowing equitable relief for breach of fiduciary duty to plaintiffs who seek whatever would have been their benefits had the plan

honored employee's entitlement. *See* Republished opinion in *Poore v. Simpson Paper Co.*, 2009 U.S. App. LEXIS 11170 (9th Cir. May 21, 2009) (former employer was not entitled to summary judgment because it breached its fiduciary duty to beneficiaries who were participants under ERISA with standing to bring claims for equitable relief even though they were not seeking vested benefits); *Vaughn v. Bay Envir. Mgt., Inc.*, 567 F.3d 1021 (9th Cir. June 4, 2009) (dismissal for lack of subject matter was improper because former employees had standing as participants to recover losses occasioned by breach of fiduciary duty even though they received full disbursement of their individual account under defined contribution plan); *Harris v. Amgen, Inc. et al.*, 573 F.3d 728 (9th Cir. July 14, 2009)(complaint should not have been dismissed for lack of standing because former employee who received less than full entitlement in benefits as a result of a breach of fiduciary duty had claim under 29 U.S.C. § 502(a)(2)); *In re: Unisys Corp. Retiree Med. Benefits ERISA Litig. v. Unisys Corp.* 2009 U.S. App. LEXIS 19769 (3rd Cir. September 2, 2009)(former employees claim under 29 U.S.C. § 1132(a)(3) for promised retirement medical benefits encompassed a claim for breach of fiduciary duty, a violation of ERISA, entitling them benefits when employer failed to advise employees the plan could be terminated or amended and statute of limitations for breach of fiduciary duty was only applicable in cases of voluntary termination). Although other circuits have recognized the right of former employees to bring claims for equitable relief for breach of fiduciary

duty to recover their full entitlement to benefits denied by biased decision-makers, the Eleventh Circuit Court of Appeals has remained steadfast in its view that Petitioner was not entitled to benefits as equitable relief for a breach of fiduciary duty.

OTHER SUBSTANTIAL GROUNDS

Petitioner candidly recognizes that the grant of a Petition for Rehearing is relief rarely granted. However, Justice Scalia in dissent in *Metropolitan Life Insurance Company, Inc. v. Glenn* "MetLife" suggested the majority should not have addressed the holding of *MetLife* to the employer/administrator setting because that case was not before the Court. *Metropolitan Life Insur. Co., Inc. v. Glenn*, 554 U.S. ___, 128 S.Ct. 2343 (2008). Petitioner respectfully suggests that the case Justice Scalia has been waiting for to address a conflict of interest in the employer/administrator setting is the instant case. The only other case we are aware of is the collateral case pending in the Eleventh Circuit Court of Appeals below filed by Petitioner's primary counsel on behalf of seven additional former workers of "Old" Monsanto who are similarly situated to Petitioner. *See Heptinstall et al. v. Monsanto Company, Inc. et al.* Appeal No. 9-12665-DD.

"Old" Monsanto and its defined benefit plan no longer exist. Pharmacia, new Monsanto Company, Inc., and Solutia Inc. as successor entities of "Old" Monsanto each established defined contribution plans funded from assets formerly held in "Old" Monsanto's collective trust. A

"defined contribution plan" is "a pension plan which provides for an individual account for each participant for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any *forfeiture* of accounts of other participants which may be allocated to such participant's account. ERISA Section 3(34)." *Tullis v. UMB Bank, N.A.*, 515 F.3d 673, 675 n.2 (6th Cir. 2008) citing 29 U.S.C. § 1002. Because "Old" Monsanto under its defined benefit plan never reported separated workers with an entitlement to a deferred vested accrued benefit successor entities never established individual accounts under successor plans for these "working class" participants. *Varity Corporation v. Howe*, 516 U.S. 489 (1996); *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004). Successor entities of "Old" Monsanto, Pharmacia, new Monsanto Company, Inc., and Solutia, denied benefits to Petitioner as part of a *Varity* scheme to establish precedent to "take" former workers' separated vested pension benefits. In the case pending in the Eleventh Circuit, *Heptinstall v. Monsanto Company, Inc.* No. 9-12665-DD, Pharmacia, new Monsanto Company, Inc., and Solutia, Inc. cite the instant case as precedent for the denial of equitable relief to "everyone" as a matter of *stare decisis*. Counsel states "the 'Eleventh Circuit's recent holdings in *Gilley* [*v. Monsanto Co.*, 490 F.3d 848 (11th Cir. 2007) and 309 Fed. Appx. 362 (11th Cir. 2009)] provide clear, *stare decisis* guidance for the disposition of plaintiffs' claims" and that case *Gilley* and this case 'arise from substantially identical facts, were

brought by the same attorney for plaintiffs, advance ERISA claims, and involve many of the same defendants." Appellees' Brief in *Heptinstall v. Monsanto Company, Inc. et al.* 09-12665-DD at p. 2.[2]

If a decision made by a conflicted trustee utilizing his facts and law under an arbitrary or capricious standard establishes precedent for the denial of "vested" benefits for all former workers promised a pension then ERISA is a nullity. If *Gilley v. Monsanto Company, Inc.*, 490 F.3d 848 (11th Cir. 2007), a case reviewed under the arbitrary standard, is precedent for denying equitable relief for breach of fiduciary duty to all former workers of "Old" Monsanto denied a vested pension benefit then ERISA offends the Constitution by denying substantive due process and the right to redress in regards to persons never before the court. *Caperton et al. v. Massey Coal Co., Inc.*, 556 U.S. ___, 129 S. Ct. 2252 (2009)(holding "it is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process"); *Eastern Enterprises v. Apfel Commissioner of Social Security, et al.*, 524 U.S. 498 (1998)(holding a regulatory act by Congress that permits the "taking" of property belonging to A for the benefit of B is unconstitutional under the Fifth Amendment "taking" clause as applied). *Id.*

In the instant case the plan administrator for new Monsanto Company, Inc., a successor entity of "Old" Monsanto and hardly a fair

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[2]The only decision in Petitioner's favor during six years of litigation was the decision by the District Court to award Petitioner his accrued benefit based on a conflict of interest. Appendix A to C.

tribunal, denied benefits to Petitioner in the interest of establishing precedent for the denial of vested benefits to all former workers. If Respondents are successful in their *Varity* scheme to denied all vested benefits of former workers, then a regulatory act by Congress, ERISA, has permitted the "taking" of property belonging to one group of citizens, the "working class", for the benefit of another, corporate executives. *Id.* Unless this Court recognizes the appropriateness of equitable relief to redress a breach of fiduciary duty "Old" Monsanto's former workers who separated with a vested accrued benefit will have their pensions forfeited inuring to the benefit of former executives who acted as trustees. In the interest of justice we believe the case merits the fullest possible attention at this juncture to clarify the rights of former employees to equitable relief for breach of fiduciary duty and to resolve the debate over a conflict of interest as a factor to be considered by reviewing courts in the employer/administrator setting.

In the debate in Congress over the passage of ERISA, corporate participants including "Old" Monsanto, argued in favor of a uniform body of law to reduce costs for plan sponsors.[3] Surely Respondents as successor entities of "Old" Monsanto are just as eager to resolve a split in the circuits over the availability of equitable relief for breach of fiduciary duty for the protection of "working class" participants' vested pensions against forfeiture. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 156, 87 L. Ed. 2d 96, 105 S.

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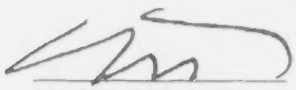
[3]*Missouri v. Monsanto Co., Inc.*, 517 S.W.2d 129 (Mo. 1974).

Ct. 3085 (1985) (Brennan, J., concurring). We believe this Court seems certain to grant merits hearings to address the issues of a conflict of interest as a factor in the employer/administrator setting and the availability of equitable relief to redress the denial of benefits as a result of a breach of fiduciary duty at some point in the very near future. We do not believe former workers of "Old" Monsanto should be compelled to suffer the blow of the "taking" of their property, their "vested" pension benefit, as a result of attrition while other jurisdictions continue to argue the implications of this Court's closely decided cases permitting equitable relief only on a limited basis under ERISA's catchall provision. Rather, Petitioner on behalf of all former workers of "Old" Monsanto believes he should be permitted to participate in what will apparently be the definitive re-argument of these issues.

ERISA was passed by Congress to ensure participants receive promised benefits not as a means to promote forfeiture on a wide scale basis in the interest of corporate executives. 29 U.S.C. § 1001 et seq. Without the relief requested all former workers of "Old" Monsanto who had a separated deferred vested benefit under its defined benefit pension plan may suffer forfeiture of their vested pension benefit contrary to Congresses' stated purpose of establishing ERISA. Accordingly, we believe the Petition for Rehearing is due to be granted.

Accordingly, Petitioner respectfully requests this Court either recall the mandate and remand with instructions in light of intervening precedent or suspend the order denying certiorari and pending a decision by the Eleventh Circuit Court of Appeals in *Heptinstall et al. v. Monsanto Company, Inc.* Appeal No. 9-12665-DD consider Petitioner's Petition for Rehearing. Petitioner's application for a stay under Rule 22 is attached.

Respectfully Submitted,



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Wendell F. Gilley

CERTIFICATION

Counsels for Petitioner(s) certify that the grounds for granting the Petition for Rehearing is restricted to the intervening circumstances and other substantial or controlling grounds not previously presented as setout in the paragraphs above warranting the grant of the Petition for Rehearing, and the Petition is filed in good faith and not for delay. Respondents will not be prejudiced because the only relief available to Petitioner is equitable relief to redress a breach of fiduciary duty.

Respectfully Submitted,

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Counsel for Petitioner(s)
Wendell F. Gilley

Sworn to and subscribed before, _____, this the 15th day of October, 2009

Official Seal
Kathleen M McGuire
Notary Public State of Illinois
My Commission Expires 11/05/2011

NOTARY PUBLIC FOR THE STATE OF ILLINOIS
My Commission Expires: 11/5/11

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

No. 04-0562

[Filed January 26, 2006]

WENDELL F. GILLEY, an individual and as class representative,

Plaintiff(s)

v.

MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation

Defendants.

BEFORE: Robert B. Propst, SENIOR UNITED STATES DISTRICT JUDGE

ORDER

In accordance with Findings of Fact and Conclusions of Law filed contemporaneously herewith, judgment is entered in favor of the plaintiff. The court adjudges and declares that the plaintiff is entitled to retirement benefits as provided in the defendants' ERISA Plan. The defendants will pay accrued benefits on past due payments plus appropriate interest and continue to pay retirement benefits as they accrue. The court expressly determines that there is no just reason for delay and expressly directs the entry of a final judgment as stated above. Costs are assessed against the defendants. The parties may file suggested amendments to this judgment within ten (10) days.

DONE and **ORDERED** this the **26th** day of January, 2006.

/s/ ROBERT B. ROPST

SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

No. 04-0562

[Filed January 26, 2006]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff(s)	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation	)
Defendants.	)

BEFORE: Robert B. Propst, SENIOR UNITED STATES DISTRICT JUDGE

FINDINGS OF FACT

AND

CONCLUSIONS OF LAW

This cause came on to be heard at trial on the limited issue of whether plaintiff's entitlement to retirement benefits vested before his employment was terminated. In essence the present issue is whether the plaintiff should be credited with 1000 or more hours of vesting service for the year 1972. This court has framed the issues and arguments in its Memorandum Opinion filed on May 31, 2005, and will not repeat those issues and arguments here.[1]

---

[1]Since the May 31, 2005 opinion dealt with a motion for summary judgment, it is not entirely relevant to the trial herein addressed. The limited issues of this trial are, however, framed and discussed in that opinion, and, to the extent applicable are adopted here. Some issues addressed in the May 31, 2005 opinion were not tried in the trial now being addressed. See various filings of the parties for further argument and development. While it is doubtful, the respective proposed findings of fact and conclusions of law of the parties may contain some areas of agreement. To the extent they do, they are adopted. The court proposed addressing questions to IRS and/or the Department of Labor. Both sides objected, so the court decided to forego this proposal. The plaintiff's service began on August 30, 1972. Defendant has acknowledged that if that service had begun in late July 1972, plaintiff's retirement benefits would have vested.

While the court has been inundated with verbiage, the task is to determine whether the plaintiff should receive credit for 1000 hours of vesting service for 1972. The issue is close from any perspective.[2]

The court finds and concludes that the defendants' denial of plaintiff's retirement benefits is to be reviewed under a "heightened arbitrary and capricious" standard because of a conflict of interest.

The court further finds and concludes that the defendants' conclusion that plaintiff was not entitled to have overtime considered was arbitrary and capricious and not due to be herein considered. Further, the 95 hour rule is not applicable to a 1972 calculation. In general, later amendments to the Plan should not have an effect on the 1972 calculations if they impact adversely on plaintiff's entitlement.

The court's task is to determine how many hours the plaintiff is entitled to for 1972. Since the defendant does not have adequate records of the plaintiffs overtime hours, the plaintiff should be given some benefit of the doubt in this regard.

---

[2]If plaintiff's testimony that he worked as many overtime hours as regular hours in 1972 is accepted, he would be entitled to 1000 hours of service time. The court has no substantial basis for discrediting this testimony. *See attached* Exhibit A filed by the plaintiff on December 19, 2005.

The plaintiff makes two arguments that this court cannot accept. The first is that overtime hours should be counted as one and one-half hours because the plaintiff would have been paid based on one and one-half hours. The court finds no basis for such a calculation of service time. Second, plaintiff argues that the hours that plaintiff accrued for vacation time, sick pay time, etc. are to be counted at the time accrued rather that at the time taken. The court cannot accept this argument. Without the validity of such arguments, it is questionable as to whether the plaintiff had 1000 actual hours of service in 1972. On the other hand, the defendants' failure to keep adequate records leads to another theory of recovery. 29 C.F.R. § 2530.200b-3(a) states:

> Payroll records, for example, may provide sufficiently accurate data to serve as a basis for determining hours of service. If, however, existing records do not accurately reflect the actual number of hours of service with which an employee is entitled to be credited, a plan must either develop and maintain adequate records or use one of the permitted equivalencies.
>
> . . . .

29 C.F.R. § 2530.200b-3(c) states:

> Use of equivalencies for determining service to be credited to employees.
>
> (1) The equivalencies permitted under paragraphs (d), (e) and (f) of this section are methods of determining service to be credited to employees during computation periods which are alternatives to the general rule for determining hours of service set forth in paragraph (a) of this section. The equivalencies are designed to enable a plan to determine the amount of service to be credited

> to an employee in a computation period on the basis of records which do not accurately reflect the actual number of hours of service required to be credited to the employee under § 2530.200b-2(a). However, the equivalencies may be used even if such records are maintained. Any equivalency used by a plan must set forth in the document under which the plan is maintained.
>
> . . . .

29 C.F.R. § 2530.200b-3(d) states:

> Equivalencies based on working time.
>
> (1) Hours worked. A plan may determine service to be credited to an employee on the basis of hours worked, as defined in paragraph (d)(3)(1) of this section, if 870 hours worked are treated as equivalent to 1,000 hours of service and 435 hours worked are treated as equivalent to 500 hours of service.
>
> (2) Regular time hours. A plan may determine service to be credited to an employee on the basis of regular time hours, as defined in paragraph (d)(3)(ii) of this section, if 750 regular time hours are treated as equivalent to 1,000 hours of service and 375 regular time hours are treated as equivalent to 500 hours of service.

Other parts of 29 C.F.R. § 2530.200b-3 may have application.

The plaintiff makes two arguments of "equivalency" by his attached Exhibits B and C filed by him on December 19, 2005. The court finds and concludes that the plaintiff clearly had at least 870 hours of service (sic) for 1972. On this theory, which the court accepts, the plaintiff's entitlement to

benefits vested prior to this termination. Judgment will be entered in favor of the plaintiff.

This the 26th day of January, 2006. (Exhibits Omitted)

/s/ ROBERT B. PROPST

SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

No. 04-0562

[Filed March 3, 2006]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff(s)	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation	)
Defendants.	)

BEFORE: Robert B. Propst, SENIOR UNITED STATES DISTRICT JUDGE

ORDER

This cause comes on to be heard on the Defendants' Motion to Amend Judgment of January 26, 2006 filed on February 8, 2006.

The court's intention is to base its partial final judgment solely on a finding and conclusion that the plaintiff is entitled, for reasons stated, to be credited with 1000 hours of service for 1972. Any other claim not previously dismissed will still be pending.

Any issues with regard to the effect of the judgment on other claims can be resolved by further motion practice.

A significant issue with regard to the partial final judgment may be whether the following statement of the defendants, if correct in some instances, has application to a defendant with a conflict of interest. "Although federal regulations recognize a permitted equivalency that uses 870 Hours of Service as the threshold, the regulation is clear that it is for the Plan, and not individual participants, to elect the equivalency of its choice. *See* C.F.R. § 2530.200b-3(a)."

The motion is **DENIED**.[1]

DONE and **ORDERED** this the 3rd day of March, 2006.

/s/ ROBERT B. PROPST

SENIOR UNITED STATES DISTRICT JUDGE

[1]The court recognizes that ERISA was not in effect in 1972. The court's reference to "benefit of the doubt" was not intended as an exact legal standard, but merely to suggest that the defendants were not able to rebut the plaintiff's evidence because it did not retain payroll records.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-13646-EE

[Filed June 28, 2007]

WENDELL F. GILLEY, an individual and as class representative,

Plaintiff(s)-Appellant(s),

v.

MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation

Defendants-Appellees,

BEFORE: CARNES, PRYOR, and FARRIS,* Circuit Judges.

CARNES, Circuit Judge:

ORDER

Throughout his judicial career Holmes relished challenging cases. While on Massachusetts' highest court he confessed to a friend that although none of the cases he had handled that year had been of universal interest, "there is always the pleasure of unraveling a difficulty."[4] A decade and a half later, while on the Supreme Court, he told the same friend that he had few cases of general interest that term, but "[t]here is always the fun of untying a knot and trying to do it in good compact form."[5] It is a pity that Holmes did not live to see ERISA cases.

I.

Wendell Gilley was employed by Monsanto Company, Inc. from August 31, 1972 through February 16, 1982 at its Sand Mountain textile plant in

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*Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

[4]Oliver Wendell Holmes, Jr., *Feb. 23, 1890 Letter to Frederick Pollack, in* THE HOLMES-POLLACK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874 – 1932 32, 33 (Mark DeWolfe, ed., Harvard Univ. Press 2d prtg. 1941).

[5]Oliver Wendell Holmes, Jr., *May 25, 1906 Letter to Frederick Pollack, in* THE HOLMES-POLLACK LETTERS, *supra* note 1, at 123, 124.

Northeast Alabama. Monsanto closed the plant in March of 1981, but Gilley remained on the payroll in layoff status until February 1982 when he was finally let go. Although the period of his employment was under nine-and-a-half years, Gilley claims that with the overtime that he worked in 1972, he acquired the necessary ten years of "Vested Service" to merit pension benefits.

Under Monsanto's Salaried Employees' Pension Plan, certain employees are entitled to benefits if they are able to meet the vesting requirements of the plan. Although Monsanto has amended its pension plan several times over the years, all relevant versions of the plan set out the same basic vesting requirements: (1) an eligible employee must reach retirement age, and (2) the employee must acquire at least ten years of "Vested Service." An employee earns a year of Vested Service when he completes 1,000 "Hours of Service," defined as all hours of employment for which an employee is directly or indirectly compensated, during that year. The manner in which Hours of Service are calculated has varied as Monsanto has amended its pension plan.

When Gilley began work at Monsanto, the 1971 Plan was in effect. The pension plan was amended in 1976 to comply with the requirements of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.*,

which went into effect, for our purposes, in 1976.[5] According to Monsanto, both the 1971 Plan and the 1976 post-amendment Plan utilized the "Elapsed Time Method" to calculate Vested Service for pension purposes. Under this method, an employee is credited with the hours that result from dividing the total number of calendar days of employment, including weekends and holidays, by 365 and then multiplying that number by 2,080 (the total hours in a "Standard Work Year" based on a forty-hour work week). In other words, an employee's Hours of Service are determined based on the fraction of the year he is employed, multiplied by the Standard Work Year—if an individual is employed for 176 days out of the year, he would be entitled to 1,002 Hours of Service or one year of Vested Service.

Sometime between 1979 and 1981, the Plan Committee decided to change the way Hours of Service are determined, adopting the "95-Hour Rule" and incorporating it into the amendments to the 1981 Plan. Under this calculation method, the provider credits all employees with ninety-five Hours of Service for each two-week period they are employed, regardless of the

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[5]The majority of ERISA became effective January 1, 1975, but for all pension plans in existence as of January 1, 1974, of which the Plan here was one, the participation and vesting standards of ERISA became applicable on the first day of the plan year beginning after December 31, 1975, effectively 1976. *See* 29 U.S.C. § 1061(b)(2).

actual hours worked. The 95-Hour Rule expressly excludes additional credit for overtime hours, embodying the assumption that the fifteen extra Hours of Service credited on a biweekly basis (assuming a 40-hour week or 80 hours every two weeks) is a fair way to cover any overtime hours worked. In addition to adopting the 95-Hour Rule, the 1981 Plan stated that an employee's benefit rights are to be determined according to the pension plan in effect at the time that the employee separates from Monsanto.

Believing that he had acquired ten years of Vested Service, even though he had only worked for Monsanto for nine full years and part of two other years (1972 and 1982), Gilley applied for pension benefits in 2001. Monsanto denied his request, because it concluded that Gilley's Vested Service fell short of the requisite ten years. Gilley filed an administrative appeal, and the Monsanto Plan Committee denied his petition. It applied the 1981 Plan and the 95-Hour Rule to determine that Gilley was only entitled to 9.594 years of Vested Service.

Gilley filed suit claiming that Monsanto had: (1) arbitrarily and capriciously denied his claim for benefits, in violation of ERISA § 502, 29 U.S.C. § 1132; (2) made oral and written assurances that all employees hired at the Sand Mountain plant after September 1972 were vested and, therefore,

is equitably estopped from denying Gilley benefits now under ERISA § 502; (3) intentionally closed the Sand Mountain Plant right before the employees would reach the ten year mark, in violation of ERISA § 510, 29 U.S.C. § 1140; (4) amended the Plan to retroactively reduce or eliminate the amount of accrued Hours of Service in violation of ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1); and (5) breached its fiduciary duty by failing to act in the best interest of plan participants, in violation of ERISA § 404, 29 U.S.C. § 1104. Monsanto filed a motion to dismiss, arguing that the 1981 Plan governed the determination of Gilley's credit, and that under the plan Gilley lacked the requisite ten years of Vested Service. The district court denied the motion to dismiss.

Gilley then filed an amended complaint, specifically restating all of his claims under the "equitable relief" section of ERISA, § 502(a)(3), 29 U.S.C. § 1132(a)(3), and adding a claim under § 502(c), 29 U.S.C. § 1132(c), and § 510, 29 U.S.C. § 1140, asserting that Monsanto had interfered with his attempts to attain benefits by refusing to provide him with requested documents. The amended complaint alleged that the 95-Hour Rule should not be applied because, according to Gilley, it is less favorable to him than the 1976 Plan's method of calculating Hours of Service.

Monsanto filed a motion for summary judgment, asserting that ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), only permits equitable relief and does not apply when a party is seeking purely legal relief, as Monsanto claimed Gilley was doing.[7] Additionally, Monsanto restated its argument that Gilley cannot prove the ten years of Vesting Service necessary to merit benefits. It put before the court Social Security records indicating that Gilley had earned a total of $2,149.68 in 1972, and other records showing that in 1972 his base salary had been $420 monthly, or $5,040 annually. Gilley argued that the $420 figure actually included overtime pay and that his monthly base salary was really only $390, which would have been $4,680 annually.

Based on all of those records, Monsanto argued that even if the district court calculated Hours of Service based on the actual hours Gilley worked,

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[7]Monsanto contends that Gilley cannot properly make out an equitable claim under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), because he is actually seeking legal relief which can only be granted under § 502(a)(1)(b), 29 U.S.C. § 1132(a)(1)(b). Our disposition of this appeal does not require us to decide the nature of the relief Gilley is seeking, and it is not a question that goes to the existence of subject matter jurisdiction. *See Blue Cross & Blue Shield of Ala. v. Sanders*, 138 F.3d 1347, 1352 (11th Cir. 1998) (noting that subject matter jurisdiction exists even if the remedy sought under § 502(a)(3) is legal in nature, because a finding that the relief sought is legal in nature "'does not negate the existence of federal subject matter jurisdiction, but rather indicates that [the plaintiff] may have failed to state' a claim upon which relief can be granted" (quoting *Health Cost Controls v. Skinner*, 44 F.3d 535, 537–38 (7th Cir. 1995)).

Gilley still was not entitled to a pension. Using the $2,149.68 figure, a $420 monthly base salary, and the 2,080 hour "Standard Work Year" set out in the 1981 Plan, Monsanto asserted that Gilley could have actually worked only 887.2 hours in 1972 (if all hours were compensated equally), well short of the 1,000 hours needed. Monsanto also pointed out that because the $2,149.68 salary Gilley earned in 1972 included compensation for some overtime and holiday hours, which would have been paid at a premium rate, Gilley's actual hours worked would be much less. What's more, even if Gilley's claimed $390 monthly salary figure and the resulting $4,680 annual salary figure are accepted, the maximum it appears Gilley could have worked in 1973 based on the Social Security records is 955.41 hours (assuming all hours were compensated at the same hourly wage). Still, the district court denied Monsanto's motion, finding that a trial was warranted based on the "closeness of the vesting issue."

A two-day bench trial was conducted solely to decide the number of Hours of Service credit Gilley was entitled to receive for his employment in 1972. After trial, the district court ordered Gilley to submit an "itemized, succinct list showing exactly how [he] . . . would arrive at a minimum of 1,000 [H]ours of [S]ervice in 1972." In response, Gilley offered three "equivalencies,"

claiming that each showed he was entitled to benefits. ERISA gives a plan the option of using equivalencies in order to simplify the record keeping and calculation burdens associated with determining Hours of Service. 29 C.F.R. § 2530.200b-3(a). A list of equivalencies from which a plan may choose is contained in the regulation, id. § 2530.200b-3(d), (e).

The district court accepted two of the three equivalencies that Gilley suggested. One of those two calculates Hours of Service based on "Hours Worked" under 29 C.F.R. § 2530.200b–3(d)(1), granting 1,000 Hours of Service if 870 hours are worked. The other calculates Hours of Service based on "Regular Time Hours" under 29 C.F.R. § 2530.200b–3(d)(2), granting 1,000 Hours of Service if 750 "Regular Time Hours" are worked. The parties dispute whether Gilley would be entitled to a pension under either or both of the two equivalencies the district court adopted. The math involved with both equivalencies is dense, enough so that during oral argument counsel had difficulty answering some of our questions about the numbers and formulas used during the trial.

The more fundamental point that Monsanto stressed, however, is that the Plan never included either of the two equivalencies that the district court used at Gilley's urging. Instead, the 1981 Plan included the 95-Hour Rule.

another equivalency permitted by ERISA. *See* 29 C.F.R. § 2530.200b-3(e)(1)(iii). We will spare the reader the details of how the 95-Hour Rule plays out in Gilley's circumstances, except to say that everyone agrees that under it Gilley would not be entitled to a pension.

In its findings of fact and conclusions of law, the district court refused to apply the 95-Hour Rule set out in the 1981 Plan. Its reasoning was that "later amendments to the Plan should not have an effect on the 1972 calculations if they impact adversely on plaintiff's entitlement." Even though the two equivalencies that were more favorable to Gilley had never been part of the Plan, the district court justified their use on the grounds that Monsanto had not kept adequate records of the hours Gilley worked in 1972. It said that Gilley was entitled to the "benefit of the doubt" because Monsanto had failed to keep adequate records from that year. Applying the two equivalencies that Gilley preferred, the court determined that he did have the requisite Hours of Service to receive a full year of credit for 1972, giving him ten years of Vested Service which entitled him to a pension. Throughout its reasoning, the court applied a "heightened arbitrary and capricious" standard of deference, because it concluded that the Plan Committee had a conflict of interest in making benefit decisions.

The court's judgment ordered Monsanto to pay Gilley his past due pension benefits, "plus appropriate interest," and to pay additional retirement benefits as they accrue in the future. Monsanto filed a motion to alter or amend the district court's judgment, asserting multiple mathematical and legal errors in the application of the two equivalencies the district court used. After the court denied that motion, Monsanto filed this appeal.

II.

We initially had some doubt about our jurisdiction to decide this appeal because, while the district court ordered Monsanto to pay "appropriate interest" on the award of past benefits, it did not specify the rate of interest or the date from which the interest would be calculated. We were concerned that the judgment might not be final under 28 U.S.C. § 1291 for purposes of appellate review.

The district court's failure to set an interest rate for calculating prejudgment interest might have been a problem for the purpose of our jurisdiction if the judgment had no injunctive aspects. *See SEC v. Carrillo*, 325 F.3d 1268, 1272–73 (11th Cir. 2003) (per curiam) (noting that "if the judgment amount, the prejudgment interest rate, or the date from which prejudgment interest accrues is unclear, the calculation of prejudgment

interest is no longer a ministerial act and the court's order is not final"); *but see Moon v. Am. Home Assurance Co.*, 888 F.2d 86, 89–90 (11th Cir. 1989) (addressing the merits but remanding the case back to the district court for clarification on the questions of whether prejudgment interest was intended and the rate at which any such interest should be calculated). However, the judgment here does include injunctive relief, because it requires Monsanto to continue to pay pension benefits as they accrue in the future. Under 28 U.S.C. § 1292(a)(1), we have jurisdiction over orders granting injunctive relief. The district court's judgment here is injunctive enough in nature to give us jurisdiction over the appeal.

III.

On the merits, both sides agree that Gilley must have ten years of credit to be entitled to a pension, and they agree that he earned at least nine years of credit for his work at the plant from 1973 to 1982. Their disagreement is about whether Gilley gets a full year of credit for 1972, his first year on the job, when he actually worked only four months for Monsanto. If Gilley is credited with a full year for working those four months, he gets a pension.

The district court's conclusion that Gilley should be treated as having worked a full year in 1972 was based on its belief that instead of the 95-Hour

Rule in the 1981 Plan, the Hours Worked or Regular Time Hours equivalencies, which Gilley proposed, should be used. The parties disagree about whether Gilley is entitled to a pension even if those two equivalencies are used, but they do agree that he is not entitled to a pension under the 1981 Plan's 95-Hour Rule. The question that determines the issues we address in this appeal is whether the 95-Hour Rule is the equivalency that should be applied.

A.

The parties think that the answer to that question might depend on the standard of deference applicable to the Plan Committee's decision to deny Gilley pension benefits. Monsanto argues that the arbitrary and capricious standard applies, while Gilley thinks the district court was correct to apply a heightened arbitrary and capricious standard. Given the nature of the issue on which this case turns, we doubt that the standard of deference makes any difference. To the extent that it does, however, the proper standard is arbitrary and capricious.

ERISA does not explicitly establish the standard of review to be applied to a plan administrator's decision. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109, 109 S. Ct. 948, 953 (1989). Following the Supreme Court's

direction, however, we have adopted three different standards to guide us: (1) *de novo* review applies where the plan administrator has been given no discretion in deciding claims; (2) arbitrary and capricious review applies where the plan administrator has discretion in deciding claims and does not suffer from a conflict of interest; and (3) heightened arbitrary and capricious review applies where the plan administrator has discretion but suffers from a conflict of interest. *HCA Health Servs. of Ga., Inc. v. Employers Health Ins. Co.*, 240 F.3d 982, 993 (11th Cir. 2001). For purposes of that third standard, a conflict of interest exists when a provider has to pay benefit claims out of its own assets, making it directly advantageous to the provider for the claims to be denied. These three standards have been broadly applied to both the administrator's interpretation of plan provisions as well as the administrator's decision to grant or deny benefits. *Williams v. Bellsouth Telecomms., Inc.*, 373 F.3d 1132, 1135 n.3 (11th Cir. 2004); *Paramore v. Delta Air Lines, Inc.*, 129 F.3d 1446, 1451 (11th Cir. 1997).

Our circuit law is clear that no conflict of interest exists where benefits are paid from a trust that is funded through periodic contributions so that the provider incurs no immediate expense as a result of paying benefits. *See Buckley v. Metro. Life*, 115 F.3d 936, 939–40 (11th Cir. 1997). Only when

benefits are paid from a provider's assets, so that benefit decisions have a direct and immediate impact on the provider's profit margin, does the heightened standard come into play. *See Williams*, 373 F.3d at 1135.

In this case, the Plan gave the Plan Committee discretion to make benefits decisions. The record clearly establishes that benefits were paid out of a nonreversionary trust instead of from Monsanto's own assets. In *Buckley*, we specifically considered the standard of deference to be applied when benefits are paid out of a trust funded by periodic, non-reversionary contributions. 115 F.3d at 939. We held that where the company neither incurs a direct expense in paying benefits nor directly profits from denying or discontinuing benefits, there is no conflict of interest. *Id.* at 939–40. That holding has been reiterated in subsequent cases. *See, e.g., Turner v. Delta Family-Care Disability & Survivorship Plan*, 291 F.3d 1270, 1273 (11th Cir. 2002) (per curiam) (a non-reversionary, periodic trust "eradicates any alleged conflict of interest so that the arbitrary or capricious standard of review applies"). The fact that the company is responsible for replenishing the funds of the trust is not enough to create a conflict of interest. *Id.*

For these reasons, the district court erred in applying the heightened arbitrary and capricious standard. To the extent that a deference standard applies, the ordinary arbitrary and capricious standard is the one.

B.

The district court also erred in forcing on the Plan two equivalencies that the Plan had never adopted. The court based its substitution of the equivalencies, Gilley favored for the one in the Plan on its view that Monsanto had failed to keep adequate records of the hours Gilley worked in 1972. We have some doubts about whether a court generally can impose on a plan equivalencies that the plan did not choose simply because of the absence of adequate records.

We have no doubt, however, that a plan cannot be forced to use an equivalency that is different from the one the plan chose simply because it or the company did not keep adequate records for ERISA purposes before there was any ERISA. The year we are talking about is 1972, and ERISA was not enacted until September of 1974 (with an effective date, for our purposes, of January 1, 1976, *see* 29 U.S.C. § 1061(b)(2)). Only after the time for doing so had passed did the Plan and the company learn that it would be necessary to

make and keep the records. Companies and pension plan managers are not required to be clairvoyant.

Instead, when it comes to pre-enactment years, ERISA requires only that plans do the best they can with the records they have, and it permits plans to choose an equivalency from those set out in the regulations. 29 C.F.R. § 2530.200b-3(b), (d), (e). This is how the relevant regulation reads:

> If accessible records are insufficient to make an approximation of the number of pre-effective date hours of service for a particular employee . . . the plan may make a reasonable estimate of the hours of service completed by such employee . . . . A plan may use any of the equivalencies permitted under this section, or the elapsed time method of crediting service . . . to determine hours of service completed . . . .

Id. § 2530.200b–3(b).

That is exactly what the Plan did in this case. It chose the 95-Hour Rule and applied the rule to the vagaries of Gilley's 1972 work history. As the regulation we have quoted shows, ERISA permitted it to do so. The statute and regulations leave the choice of equivalencies to plans, not to courts. The district court should not have overridden the Plan's choice and applied an equivalency that was not in the Plan. *See id.* § 2530.200b-3(c)(1) ("Any equivalency used by a plan must be set forth *in the document* under which the plan is maintained." (emphasis added)).

C.

In addition to substituting its own preferred equivalencies because of the lack of adequate records of Gilley's work hours in 1972, the district court also rejected the 95-Hour Rule because it was adopted after 1972. The record is unclear exactly when the 95-Hour Rule was adopted, but it was sometime between 1979 and January 1, 1981. The district court thought the fact that the rule was not adopted until sometime during that period foreclosed its use because, in the court's words, "later amendments to the Plan should not have an effect on the 1972 calculations if they impact adversely on plaintiff's entitlement."

First, it is important to recognize that there is no way Gilley could have accumulated the requisite ten years of Vested Service, under any calculation method, by the time Monsanto adopted the 95-Hour rule. On January 1, 1981, Gilley could have accumulated, at most, nine years of Vested Service credit. Even if he is given a full year of credit for 1972, he would still only have acquired nine years by the beginning of 1981. All of Gilley's arguments that he earned ten years of Vested Service count hours he worked in 1981 after the Plan was amended to put the 95-Hour Rule in place. This fact is

critical to our analysis of whether the adoption of the 95-Hour Rule and its application to Gilley violated ERISA.

Gilley takes the district court's determination that later amendments cannot adversely impact a plaintiff's entitlement and runs with it, casting it in terms of ERISA's "anti-cutback" rule. ERISA § 204(g), 29 U.S.C. § 1054(g)(1). One of the purposes of ERISA is to protect pension rights by ensuring "that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375, 100 S. Ct. 1723, 1733 (1980). To further that purpose, the "anti-cutback" rule provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan." ERISA § 204(g), 29 U.S.C. § 1054(g)(1). By its own terms, what the rule forbids is cutbacks on "accrued benefits." There is a difference between "accrued benefits" and "vested benefits."

The Supreme Court has explained that benefit accrual is "the rate at which an employee earns benefits to put in his pension account," while benefit vesting refers to the point at which a participant's pension rights become nonforfeitable "by virtue of his having fulfilled age and length of

service requirements." *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 749, 124 S. Ct. 2230, 2238 (2004). A participant is fully vested when he has a nonforfeitable right to his total accrued benefit. In other words, benefit accrual affects the size of the pension, while benefit vesting determines whether a pension will be paid at all. *See Stewart v. Nat'l Shopmen Pension Fund*, 730 F.2d 1552, 1561–62 (D.C. Cir. 1984)(noting that "'vesting' governs when an employee has a right to a pension; 'accrued benefit' is used in calculating the amount of the benefit to which the employee is entitled"); *Silvernail v. Ameritech Pension Plan*, 439 F.3d 355, 359 (7th Cir. 2006) ("Benefit accrual and vesting are related but different concepts. 'Vesting provisions do not affect the amount of the accrued benefit, but rather govern whether all or a portion of the accrued benefit is nonforfeitable.'" (quoting *Hoover v. Cumberland, Md., Area Teamsters Pension Fund*, 756 F.2d 977, 983–84 (3d Cir. 1985)).

The Plan amendment adopting the 95-Hour Rule affected Gilley's ability to vest before he had vested, but it did not reduce the amount of his accrued benefit or the rate at which he was accruing benefits. Throughout Gilley's employment the Plan provided that an employee had to reach the retirement age and have accumulated the requisite ten years of Vested Service before he

was entitled to a pension. The amendment adopting the 95-Hour Rule, which occurred during Gilley's employment, did not affect the rate at which he accrued benefits, although it did alter the method for calculating Vested Service, which in turn determined whether he received a pension. The ERISA § 204(g) anti-cutback provision does not apply to changes in vesting requirements.

There is another provision, however, that does. Section 203 of ERISA provides that a plan amendment changing the vesting schedule shall be treated as not satisfying the requirements of ERISA:

> if the nonforfeitable percentage of the accrued benefit derived from employer contributions (determined as of the later of the date such amendment is adopted, or the date such amendment becomes effective) of any employee who is a participant in the plan is less than such nonforfeitable percentage computed under the plan without regard to such amendment, unless the employee is given the option of electing the pre-amendment plan.

ERISA § 203(4)(c)(1)(A); 29 U.S.C. § 1053(4)(c)(1)(A). Although Monsanto argues that the amendment introducing the 95-Hour Rule did not change the vesting schedule, some courts have concluded that changes in the way vesting is determined can amount to an alteration of the vesting schedule. *See, e.g., Fentron Indus., Inc. v. Nat'l Shopmen Pension Fund*, 674 F.2d 1300, 1306 (9th Cir. 1982) (noting that the cancellation of past service credits, which

diminished the pension credits of otherwise vested participants, was a vesting schedule amendment). We will assume for present purposes that those courts are correct and that the Plan amendment we are discussing did change the Plan's vesting schedule.

Even making that assumption, there still was no violation of ERISA § 203, because the plain language of the provision limits its scope to benefits that are nonforfeitable ("if the nonforfeitable percentage . . . such nonforfeitable percentage") at the time the amendment is adopted or becomes effective ("determined as of the later of the date such amendment is adopted, or the date such amendment becomes effective"). ERISA § 203(4)(c)(1)(A); 29 U.S.C. § 1053(4)(c)(1)(A). When the 95-Hour Rule amendment became effective on or before January 1, 1981, and when it was adopted sometime on or before that date, Gilley was not entitled to any benefits, because he could not have earned ten years of Vested Service until after that date. Because Gilley was not vested at the time the amendment was adopted or became effective, ERISA § 203 does not help him. It follows that the district court erred in concluding that the Plan amendment adopting the 95-Hour Rule could not be applied to Gilley because it came after he had started earning credit toward his pension.

D.

To the district court's reasons for not allowing the 95-Hour Rule, Gilley adds some more of his own. Among them is his assertion that he was never properly notified of the amendment. We decline to consider that contention because it was raised for the first time in this appeal. *FDIC v. Verex Assurance, Inc.*, 3 F.3d 391, 395 (11th Cir. 1993) ("By well settled convention, appellate courts generally will not consider an issue or theory that was not raised in the district court."). Gilley also appears to argue that the amendment discriminates against him, an argument which is difficult to follow and unpersuasive in any event.

Finally, Gilley raises a host of arguments, both before us now and in earlier proceedings, about why he is equitably entitled to a pension notwithstanding his inability to satisfy the vesting requirements under the 95-Hour Rule. The district court did not reach any of these arguments and we decline to take the first swing at them. Some may require factual development, while all of them may benefit from two-tier consideration. All of them the district court should deal with as it deems appropriate on remand.

IV.

The judgment of the district court is **VACATED** and the case is **REMANDED** for further proceedings consistent with this opinion.

/s/ Edward S. Carnes

EDWARD CARNES
CIRCUIT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

No. 04-0562

[Filed June 12, 2008]

WENDELL F. GILLEY, an individual and as class representative,

Plaintiff(s),

v.

MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation

Defendants.

BEFORE: C. Lynwood Smith, UNITED STATES DISTRICT JUDGE

MEMORANDUM OPINION

Plaintiff was ordered to show cause why this action should not be dismissed for lack of jurisdiction based on the opinions of the Eleventh Circuit in *Gilley v. Monsanto Co., Inc.*, 490 F.3d 848 (11th Cir. 2007), holding that plaintiff did not vest under the terms of his employer's pension plan *prior* to the termination of his employment, and the former Fifth Circuit in *Nugent v. Jesuit High School of New Orleans*, 625 F.2d 1285, 1287 (5th Cir. 1980)(holding that "a former employee whose pension benefits were not vested at the time of [his] termination . . . is not a 'participant' [under ERISA]."[1] *See also Jackson v. Sears, Roebuck and Co.*, 648 F.2d 225, 228-29 (5th Cir. 1981) (agreeing with *Nugent*).

Plaintiff responded to the show cause order with a number of arguments that can be distilled into two distinct themes: (1) *Nugent* is no longer an accurate statement of Eleventh Circuit law in light of the Supreme Court's holding in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and Eleventh Circuit decisions handed down subsequent to *Firestone*; and (2) the *Gilley* decision should not be followed by this court under exceptions to the law of the case doctrine. Neither of these positions has merit, and this action

is due to be dismissed because of plaintiff's lack of standing to pursue ERISA claims.

As noted by this court in its May 21, 2008 show cause order,

> "[t]he only parties that have standing to sue under ERISA are those listed in the civil enforcement provision of ERISA, codified at 29 U.S.C. § 1132(a)." *Hobbs* [*v. Blue Cross Blue Shield of Alabama*], 276 F.3d [1236,] at 1240 [(11th Cir. 2001)] (citing *Cagle v. Bruner*, 112 F.3d 1510, 1514 (11th Cir. 1997) (same)). An action seeking relief under ERISA can only be brought by a participant," a "beneficiary," or a "fiduciary" of an ERISA plan; or, in certain instances, by the Secretary of the United States Department of Labor. *See* 29 U.S.C. § 1132(a).[1]

Plaintiff insists that, by virtue of the Supreme Court's holding of *Firestone*, he is a "participant" under the relevant ERISA plan based on his allegations in this lawsuit, and that, as such, he has standing to sue under ERISA. ERISA defines a "participant" as:

> any employee or former employee of an employer, or any member or former member of an employee organization, *who is or may become eligible to receive a benefit* of any type *from an employee benefit plan* which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7) (emphasis supplied).

Plaintiff argues that the Supreme Court's holding in *Firestone* is inconsistent with and, thus, overturns the former Fifth Circuit's prior holding

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[1] Doc. no. 189 (show cause order) at 5-6.

in *Nugent* — a case indicating that plaintiff is not a "participant." This court finds that there is no inconsistency between *Firestone* and *Nugent*. *Firestone* provides the definitive analysis of the "may become eligible to receive a benefit" language in 29 U.S.C. § 1002(7), and held that a former employee is a "participant" only if he or she has a reasonable expectation of returning to covered employment, or has a colorable claim that he or she will fulfill eligibility requirements in the future. *See* 489 U.S. at 117-18 ("In order to establish that he or she 'may become eligible' for benefits, a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future."). Here, plaintiff does not meet either criterion.

Specifically, plaintiff argues that he has a colorable claim for benefits by virtue of his allegations that he is a "participant" of the Monsanto Company Salaried Employees' Pension Plan.[2] Stated differently, plaintiff asserts that he is a "participant" because he claims it to be so. His argument, however, runs contrary to key components of the *Firestone* decision. In *Firestone*, the Supreme Court specifically rejected the notion that 29 U.S.C. § 1132 "should

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[2] *Nota bene*: Plaintiff does not, and indeed cannot under the facts of this case, argue that he has a reasonable expectation of returning to covered employment.

be read to mean that a civil action may be brought by someone who *claims to be a participant*," and found that such an "interpretation of the term 'participant' . . . strays far from the statutory language." *Firestone*, 489 U.S. at 117 (emphasis supplied). "To say that a 'participant' is any person who claims to be one begs the question of who is a 'participant' and renders the definition set forth in § 1002(7) superfluous." *Id.*

> In our view, the term 'participant' is naturally read to mean either 'employees in, or reasonably expected to be in, currently covered employment,' *Saladino v. I.L.G.W.U. National Retirement Fund*, 754 F.2d 473, 476 (2nd Cir. 1985), or former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to *vested* benefits. *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986) [(*abrogated by Kayes v. Pacific Lumber Co.*, 51 F.3d 1449 (9th Cir. 1995)].

Id. (emphasis supplied).

Further, *Firestone* makes it clear that a former employee who does not have "a colorable claim to *vested* benefits . . . simply does not fit within the [phrase] 'may become eligible.'" *Firestone*, 489 U.S. at 118 (quoting *Saladino*, 754 F.2d at 476) (brackets in original) (emphasis supplied).[3] The holding in

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[3] Justice Scalia, in his concurring opinion in *Firestone*, noted that

> the phrase "may become eligible" has nothing to do with the probabilities of winning a suit. I think that, properly read, the definition of "participant" embraces those whose benefits have

Firestone, therefore, does not appear to be inconsistent with *Nugent*, which provides that a plaintiff who did not vest under the terms of an ERISA benefits plan prior to the termination of his or her employment is not a "participant" under ERISA. *See Nugent*, 625 F.2d at 1287.

Further, contrary to plaintiff's position, *Nugent* has not been overruled by either the United States Supreme Court or the Eleventh Circuit, and it remains authority binding upon this court. Plaintiff directs this court to *Smith v. Wynfield Development Co., Inc.*, 238 Fed. Appx. 451 (11th Cir. 2007),[4] and *Lyons v. GeorgiaPacific Corp. Salaried Employees Retirement Plan*, 221 F.3d 1235, 1240 n.8 (11th Cir. 2000), as the basis for his argument that "standing in the Eleventh Circuit is no longer dictated" by *Nugent*.[5] Plaintiff's reliance on *Smith* and *Lyons* is wholly misplaced, however, because

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> vested, and those who (by reason of current or former employment) have some potential to receive the vesting of benefits in the future, but not those who have a good argument that benefits have vested even though they have not.

489 U.S. at 119 (Scalia, J. concurring).

[4]"Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority." 11th Cir. R. 36-2. *Smith v. Wynfield Development Co., Inc.* was designated by the Eleventh Circuit as an unpublished opinion. *See* 238 Fed. Appx. at 451.

[5]Doc. no. 91 (plaintiff's response to May 21, 2008 show cause order) at 7-8.

neither *Smith* nor *Lyons* addresses the issue that was before the former Fifth Circuit in *Nugent*, nor provides any discussion or mention of *Nugent*.

In *Smith*, the Eleventh Circuit addressed the question of whether a district court had subject matter jurisdiction because of ERISA preemption over a lawsuit in which only state law claims were asserted. *See* 283 Fed. Appx. at 454-58. In reaching its conclusion on the jurisdictional question, the Court determined, on the basis of the following rationale, that the appellant was a "participant" under the terms of an ERISA health insurance plan:

> Smith has standing to sue as a "participant" of the health insurance plan. . . . Here, Smith alleged that she was eligible to receive group health insurance benefits based on her employment, but that she was denied those benefits because of Defendants' failure to enroll her properly. If Smith's allegations are true, she may become eligible to receive the benefits of the group health plan to which she was otherwise entitled. Thus, based on her allegations, we conclude that Smith is a "participant" in the relevant ERISA plan, even though she was never properly enrolled in the plan. Smith cannot avoid ERISA preemption simply by stating that she was never properly enrolled in the plan, when the failure to enroll her properly is the very fact that gives rise to her cause of action.

Smith, 283 Fed. Appx. at 457. Plaintiff does not develop his argument that *Smith* overturns *Nugent*, and this court will not give consideration to arguments that are not fully developed or bolstered with legal authority. *See U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1287 n.13 (11th Cir. 2007) (refusing

to address a party's "perfunctory and underdeveloped argument"). Nevertheless, this court finds that the issue before the Eleventh Circuit in *Smith* has nothing whatsoever to do with the holding in *Nugent*, and that *Smith* cannot be read to abrogate *Nugent*.[6]

Further, unlike plaintiff in the present case, the plaintiff in *Lyons* was vested under the terms of the relevant ERISA plan prior to the termination of his employment. *See Lyons*, 221 F.3d at 1239 ("On January 5, 1991, Lyons left employment at Georgia-Pacific. In accordance with Article 4 of the Plan, Lyons was entitled to a vested benefit, because he had worked for Georgia-Pacific and Great Northern for at least five years."). For that reason, *Lyons* is distinguishable from *Nugent*, and cannot be construed as overruling *Nugent*.

Insofar as plaintiff invites this court to depart from the Eleventh Circuit's holding in *Gilley*, this court declines to do so. Plaintiff argues that there are certain scenarios that might appropriately give a district court cause to deviate from the law of the case doctrine;[7] however, the cases cited by

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[6]This is especially true in view of the well-settled rule quoted in note 6 *supra*.

[7]The doctrine of the law of the case mandates that "an appellate court decision on an issue . . . be followed in all subsequent trial court proceedings in the same case." *United States v. White*, 846 F.2d 678, 684 (11th Cir. 1988). "The purpose of the law of the case doctrine is to bring an end to litigation. In addition, it ensures that district courts obey appellate courts and that the

plaintiff in support of this proposition involve situations where the *Eleventh Circuit*, *not* a district court, set aside the law of the case doctrine and revisited a prior Eleventh Circuit holding on an issue of law or fact in a particular case. *See Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1292 (11th Cir. 2005) (conceding that there are certain circumstances whereby an appellate court may stray from the law of the case doctrine); *Klay v. All Defendants*, 389 F.3d 1191, 1197-98 (11th Cir. 2004) (same); *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1139-40 (11th Cir. 1984) (same, and noting that the law of the case doctrine is an "amorphous concept"). Contrary to plaintiff's argument, it is well-settled that, "[o]n remand a district court is not free to deviate from the appellate court's mandate." *Wheeler*, 746 F.2d at 1140 n.2. Such is the case here, and this court will not revisit those matters that were decided by the Eleventh Circuit in *Gilley*. With regard to the present case, the Eleventh Circuit held in *Gilley* that plaintiff did not vest under his employer's applicable benefits plan prior to the termination of his employment. *See* 490 F.3d at 858-60. Accordingly, plaintiff is not a "participant," and he lacks standing to sue under ERISA.

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parties are not required to relitigate settled issues." *Id.* at 684-85 (citing *Leggett v. Badger*, 798 F.2d 1387, 1389 (11th Cir. 1984)).

Consistent with the May 21, 2008 show cause order and for the reasons discussed herein this case is due to be, and hereby is **DISMISSED** without prejudice due to this court's lack of subject matter jurisdiction.[8] In addition, because this court does not have subject matter jurisdiction over this action, it lacks the power to rule on the parties' pending motions. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 84 (1998) (noting that when a court lacks subject matter jurisdiction it "cannot proceed at all, but can only note the jurisdictional defect and dismiss the suit."). As such, the clerk is directed to administratively terminate all pending motions, and to close this file. Costs are taxed as paid.

DONE this 12th day of June, 2008.

/s/ LYNWOOD SMITH
UNITED STATES DISTRICT JUDGE

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[8]Defendants assert that, although they agree that plaintiff lacks standing to pursue ERISA claims, this court should table the issue of standing, and should reach a determination as to the merits of plaintiff's remaining claims. Because standing is a jurisdictional issue, and plaintiff does not have standing to sue under ERISA, this court lacks the power to make the sort of substantive ruling sought by defendants. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 84 (1998) (mentioning that when a federal court lacks jurisdiction over a controversy, the court cannot take any action other than dismissing the case); *Bischoff v. Osceola County, Florida*, 222 F.3d 874, 877-878 (11th Cir. 2000) (noting that a plaintiff's standing to bring an action is a jurisdictional issue).

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-13646-EE

[Filed February 3, 2009]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff(s)-Appellant(s),	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation	)
Defendants-Appellees.	)

Before MARCUS, KRAVITCH and ANDERSON, Circuit Judges.

PER CURIAM:

ORDER

After oral argument and careful consideration, we conclude that the judgment of the district court is due to be affirmed. We conclude that plaintiff cannot circumvent the law of the case established in *Gilley v. Monsanto Co., Inc.*, 490 F.3d 848 (11thCir. 2007). Therefore, plaintiff's claims in Count I and V are foreclosed. With respect to his claim based upon new evidence, we conclude that the evidence is not new, and that plaintiff had ample opportunity to present that evidence in the hearing before the district court prior to the first appeal. Nor is there any other meritorious exception to the law of the case. With respect to plaintiff's claims in Counts II, III and IV, plaintiff's initial brief on appeal failed to preserve the claims, and in any event the claims are without merit.

AFFIRMED.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08-13646-EE

[Filed April 6, 2009]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff(s)-Appellant(s),	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation	)
Defendants-Appellees,	)

Before MARCUS, KRAVITCH and ANDERSON, Circuit Judges.

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson

UNITED STATES CIRCUIT JUDGE

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08-13646-EE

[Filed April 28, 2009]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff(s)-Appellant(s),	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation	)
Defendants-Appellees,	)

ORDER:

(X) The motion of Appellant, Wendell F. Gilley, for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of Appellant, Wendell F. Gilley, for recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including July 5, 2009, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson

UNITED STATES CIRCUIT JUDGE

CERTIFICATE OF COMPLIANCE
No. 08-1511

WENDELL F. GILLEY,
an individual and as class representative et al.,
Petitioner(s)

v.

MONSANTO COMPANY, INC.,
a corporation et al.
Respondents.

As required by Supreme Court Rule 39 and 33.2. I certify that the Petition for Rehearing filed herewith is in compliance with Rule 33.2 in that it contains less than forty (15) pages, excluding the parts of the petition exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this the 30th Day of October, 2009.

Elisa Smith Rives
Elisa S. Rives LLC
P.O. Box 920
Guntersville, AL 35976
(256) 582-3559

Sworn to and subscribed before me by said Affiant on the date designated below.

Date: October 30, 2009

Notary Public State of Alabama
My Commission expires: October 25, 2011

CERTIFICATE OF SERVICE
No. 08-1511

WENDELL F. GILLEY,
an individual and as class representative et al.,
Petitioner(s)

v.

MONSANTO COMPANY, INC.,
a corporation et al.
Respondents.

I, Elisa Smith Rives, hereby certify that one original and ten (10) copies of the Petition for Rehearing originally received by the Court on October 20, 2009, was resent via UPS 3-day service to the U.S. Supreme Court on October 30, 2009, with a revised Affidavit per the Clerk's direction. One copy of the revised Affidavit was sent by United States Mail to the following parties listed below, this the 30th day of October, 2009:

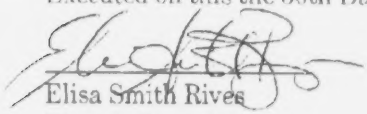
Mr. Jeffrey S. Russell, Esq.
Bryan Cave, LLP
211 N. Broadway, Ste 3600
St. Louis, MO 63102-2750
(314) 259-2725

Thomas K. Kahn, Clerk United States Mail
U.S. Court of Appeals for the Eleventh Circuit
56 Forsyth St. N.W.
Atlanta, GA 30303
Attn: Civil Appeal No. 08-13646-EE

All parties required to be served have been served.

I further declare under penalty of perjury that the foregoing is true and correct. This Certificate is:

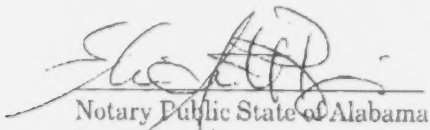
Executed on this the 30th Day of October, 2009.



Elisa Smith Rives
Elisa S. Rives LLC
P.O. Box 920
Guntersville, AL 35976
(256) 582-3559

Sworn to and subscribed before me by said Affiant on the date designated below.

Date: October 30, 2009



Notary Public State of Alabama
My Commission expires: October 25, 2011

CERTIFICATE OF SERVICE
No. 08-1511

WENDELL F. GILLEY,
an individual and as class representative et al.,
Petitioner(s)

v.

MONSANTO COMPANY, INC.,
a corporation et al.
Respondents.

I, Elisa Smith Rives, hereby certify that one original and ten (10) copies of the foregoing Petition for Rehearing and Motion to Recall Mandate, were sent via 3-day service to the U.S. Supreme Court, and 1 copy to the following parties listed below, this the 17th day of October, 2009:

Mr. Jeffrey S. Russell, Esq. (3-DAY)
Bryan Cave, LLP
211 N. Broadway, Ste 3600
St. Louis, MO 63102-2750
(314) 259-2725

David W. Gearhart (GROUND)
500 North Broadway
Suite 2000
St. Louis, MO 63102-2147
(314) 444.1394

Mr. Mark D. DeBofsky (GROUND)
Daley, DeBofsky & Bryant
55 W. Monroe St., Ste 2440
Chicago, Illinois 60603
(312) 372-2778

Thomas K. Kahn, Clerk (3-DAY)
U.S. Court of Appeals for the Eleventh Circuit
56 Forsyth St. N.W.
Atlanta, GA 30303
Attn: Civil Appeal No. 08-13646-EE

All parties required to be served have been served.

I further declare under penalty of perjury that the foregoing is true and correct. This Certificate is:

Executed on this the 17th Day of October, 2009.

Elisa Smith Rives
Elisa S. Rives LLC
P.O. Box 920
Guntersville, AL 35976
(256) 582-3559

Sworn to and subscribed before me by said Affiant on the date designated below.

Date: October 17, 2009

Notary Public State of Alabama
My Commission expires: October 25, 2011

CERTIFICATE OF COMPLIANCE
No. 08-1511

WENDELL F. GILLEY,
an individual and as class representative et al.,
Petitioner(s)

v.

MONSANTO COMPANY, INC.,
a corporation et al.
Respondents.

As required by Supreme Court Rule 39 and 33.2. I certify that the Petition for Rehearing and Motion to Recall the Mandate filed herewith are in compliance with Rule 33.2 in that they contain less than forty (15) pages, excluding the parts of the petition and motion that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this the 17th Day of October, 2009.

Elisa Smith Rives
Elisa S. Rives LLC
P.O. Box 920
Guntersville, AL 35976
(256) 582-3559

Sworn to and subscribed before me by said Affiant on the date designated below.

Date: October 17, 2009

Notary Public State of Alabama
My Commission expires: October 25, 2011